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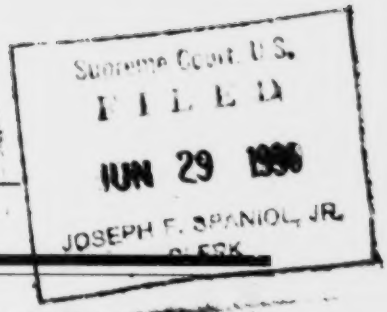

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

PATRICIA C. FOSTER and BRENT FOSTER,

Petitioners,

vs.

MICHAEL STEIN and HAYAT STEIN,

Respondents.

On Petition for Writ of *Certiorari*
To the Supreme Court of the State of Florida

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Can a State court, having no special expertise, exercise subject matter or personal *jurisdiction* over non-resident parties to a paternity/adoption proceeding commenced to execute a surrogate parenting contract, where the uncontested evidence demonstrated that the infant adopted was never within the territorial *jurisdiction* of the forum State and consent to personal *jurisdiction* over the surrogate mother appears to have been obtained by fraud?

2. Does a State court have a 14th Amendment due process obligation to set aside a judgment or grant an evidentiary hearing in a paternity/adoption case commenced to execute a surrogate parenting contract, when the uncontested evidence demonstrated that the court acquired *jurisdiction* by fraud?

3. Where a State court exercises *jurisdiction* over a paternity/adoption proceeding commenced to execute a surrogate parenting contract, can it apply its own State law when the uncontested evidence demonstrated that all the parties resided, and all the events giving rise to the litigation occurred, outside the forum State, and the contract evidenced an intent that domicile law apply?

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Case No. 89-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

PATRICIA C. FOSTER and BRENT FOSTER,[1]

Petitioners,

vs.

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Respondents.

On Petition for Writ of *Certiorari*
To the Supreme Court of the State of Florida

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of Florida is reported at 557 So.2d 861, and is reprinted in the appendix hereto at page A1.

The opinion of the District Court of Appeal of the State of Florida, Third District is reported at 534 So.2d 1218, and is reprinted in the appendix at page A5.

The memorandum decision of the Circuit Court for the State of Florida (Swanko, Acting Circuit Court Judge) was not reported, but is reprinted in the appendix at page A7.

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[1] Infant A.H. Stein is a real party below, who was never represented.

JURISDICTIONAL STATEMENT

The decision of the Supreme Court of the State of Florida was entered on January 18, 1990. App., p. A1. Petitioner's motion for rehearing was denied April 2, 1990.

Petitioner believes that 28 U.S.C. § 1254(1) and Supreme Court Rule 13.1 probably confer *jurisdiction* on this court because the petition seeks review of a civil action within 90 days of the denial of a motion for rehearing by a court of last resort.

STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. IV, § 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may be general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

U.S. Const., 14th Amendment, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United State; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Uniform Child Custody Jurisdiction Act[2]
Florida Statutes § 61.1308 Jurisdiction

[2] The UCCJA adopted by each of the respective states differs only in the numbering arrangement of the various subdivisions and paragraphs, but in substance and technical language identical.

Michigan § 600.651

(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(a) This state:

1. Is the home state of the child at the time of commencement of the proceedings, or

2. Had been the child's home state within 6 months before commencement of the proceedings and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state;

(b) It is in the best interest of the child that a court of this state assume jurisdiction because:

1. The child and his parents, or the child and at least one contestant, have significant connection with this state, and

2. There is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(c) The child is physically present in this state and

1. The child has been abandoned, or

2. It is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected; or

(d) 1. It appears that no other state would have jurisdiction under the prerequisites substantially in

accordance with paragraph (a), paragraph (b), or paragraph (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and

2. It is the best interest of the child that a court of this state assume jurisdiction.

Florida Rules of Civil Procedure, Rule 1.540:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order or proceeding for the following reasons:

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; ... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, decree, order or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order or proceeding or to set a side a judgment or decree for fraud upon the court.

Florida Rule of Civil Procedure, Rule 1.140, Defenses

(b) How Presented. ... Any ground not stated shall be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time.

Rules Regulating the Florida Bar, DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another

Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(E) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

Florida Statutes § 63.083. Execution of Consent; family medical history.

(1) Consent shall be executed as follows:

(a) If by the person to be adopted, by oral or written statement in the presence of the court or by being acknowledged before a notary public.

(b) If by an agency ...

(c) If by any other person, in the presence of the court or by affidavit.

(d) If by a court, ...

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(4) The consent shall be executed only after the birth of the child, in the presence of two witnesses, and be acknowledged before a notary public.

(5) Consent may be withdrawn only when the court finds that the consent was obtained by fraud or duress.

Michigan Adoption Code § 710.44 Form and Execution of consent

Sec. 44. (1) Except as otherwise provided in this section, the consent required by section 43 of this chapter shall be by a separate instrument executed before the judge of probate having jurisdiction or, at the court's direction, before another judge of probate in this state. A consent may be executed before a referee of the probate court. If the consent of a parent or guardian is executed before a judge or referee as provided in this subsection, a verbatim record of testimony related to execution of the consent shall be made.

(2) [Members of Armed Services and prisoners]

(3) [Wards]

(4) If the consent is executed in another state or country, the court having jurisdiction over the adoption proceeding in this state shall determine whether the consent was executed in accordance with the laws of that state or country and shall not proceed unless it finds that the consent was so executed.

(5) [Exceptions not relevant herein]

(6) [Investigations not relevant herein]

STATEMENT OF THE CASE

On April 15, 1988, Petitioner, Patricia C. Foster (herein the Surrogate Mother[3]), filed a motion to vacate a paternity/adoption judgments in a bifurcated Florida proceeding wherein the first part of the proceeding was to establish paternity under a commercial surrogate parenting contract, and the second half of the proceeding, after birth, was an adoption proceeding. The grounds for vacating the judgment was fraud in obtaining her consent, and fraud in obtaining *jurisdiction* over her and the subject matter in a Florida court.

The facts of case were set forth in a verified motion by Petitioner on her personal knowledge. Respondents Michael Stein (hereinafter, the Surrogate Father[4]) and Hayat Stein (hereinafter, the Adopting Mother), did not answer the verified motion. The Surrogate Father is an attorney. At the trial court hearing, the only evidence which the Steins (hereinafter, the Adopting Couple[5]) presented were a certified Florida judgment of paternity and the certified Michigan judgment of paternity.[6]

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[3] In actuality, Mrs. Foster is the natural mother; the term Surrogate Mother is used for clarity and because the contract and popular nomenclature refers to her as such.

[4] Again, in actuality Mr. Stein is the natural father by artificial insemination; the term Surrogate Father is used for clarity and because he is the other natural parent to the surrogate parenting contract.

[5] While Adopting Couple may be somewhat inaccurate in that the Surrogate Father is not adopting because he is the natural father by artificial insemination, the term is used to refer to both Adopting Couple for simplicity.

[6] The Florida judgment came first and the Michigan judgment came second. If in fact Petitioner consented to a Florida case hearing this matter, why was it necessary for Respondents to go back to Michigan to get another judgment? Petitioner's claim is that when she found out that in reality what

On January 17, 1986, the Surrogate Mother was solicited to, and did, enter into a commercial surrogate parenting contract (hereinafter, Contract) by Michigan Attorney and surrogacy broker Noel P. Keane (hereinafter, Keane), wherein the Surrogate Father would contribute sperm to impregnate her by artificial insemination, which in fact occurred. Thereafter, on March 25, 1987, she gave birth to Infant A. H. Stein (hereinafter, Infant A.).

The boiler-plate commercial contract was executed in Michigan by the Surrogate Mother and her husband on one side, and the Surrogate Father on the other side. At the same time that the Surrogate Mother executed the contract, her husband executed a "Refusal of Consent" document, which recited two (2) Michigan statutes regarding paternity by artificial insemination. The document's last line reads, "I recognize that by refusing to consent to the insemination, I cannot be declared or considered to be the legal father of said child conceived thereby."[7]

At the same time, the Surrogate Mother, her husband, and their Michigan attorney Herbert A. Brail (hereinafter, Brail) signed another document entitled, "Acknowledgement of Independent Counsel." By that document Brail became attorney for the Surrogate Mother in Michigan. Paragraph V(C)(5) provides that the Steins shall pay for the attorney fees incurred by the Surrogate Mother under the contract. In a letter sent to the Surrogate Mother dated eight (8) days after Brail began representing the Surrogate Mother, Brail was

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was supposed to be a Michigan paternity proceeding was in reality a Florida paternity/adoption proceedings, she objected and then the Michigan proceedings were initiated as a ruse to get further signatures which she thought were part of the Michigan proceedings.

[7] The Surrogate Mother and her husband signed releases at the hospital. In the Surrogate Mother's release, she surrendered custody to the Surrogate Father and Adopting Mother, but not any parental rights, and there was an express provision prohibiting adoption, in contrast to her husband's release which expressly provided not only for surrender of custody, but parental rights as well.

listed as an attorney on the letterhead of Keane's law offices, the same Michigan attorney representing the Adopting Couple.

On August 4, 1986 the Surrogate Father filed in Florida Case No. 86-42848 FC (16), an action relating to the paternity and adoption of the Surrogate Mother's then unborn infant. In an August 29, 1986 letter from Keane's law offices, the Surrogate Mother was informed that,

> "Mr. Kessler represents [the Adopting Couple] in the Paternity Hearing[8] and Mr. Jasinski will be representing your interests."

Florida attorney Robert M. Jasinski, in fact filed a Notice of Appearance on behalf of the Surrogate Mother in the Florida paternity/adoption action. Both Kessler and Jasinski were members of the same Florida law firm.[9] On December 19, 1986, a Florida court issued an "Agreed Order Regarding Paternity." Less than a month later, on January 14, 1987 a Michigan court entered a "Consent Order Determining Paternity" in a paternity, but not adoption, action initiated by Brail, purportedly on behalf of the Surrogate Mother. Both the Florida and the Michigan orders declare the Surrogate Father to be the father of the Surrogate Mother's then unborn child. The Michigan decree makes no mention of the Florida decree. Importantly, the Surrogate Father did not declare his residency in the Florida paternity/adoption action he filed, but affirmatively admitted on January 14, 1987 in his an-

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[8] Pointedly, the letter makes no mention of the fact that the proceedings were to be in Florida, and it made no mention of the fact that it was both a paternity and an adoption proceedings.

[9] The Surrogate Mother's motion informed the court that these same attorneys had procured a paternity order in the factually identical Florida case of *Stern v. Whitehead* No. 86-12060 (Fla. 11th Cir. September 1, 1986) wherein Kessler represented the natural father, Stern, and Jasinski represented the natural mother *Whitehead*. The Sterns and the Whiteheads were the litigants in the case of *In the Matter of Baby M*, *supra*.

swer to the Michigan paternity action that he resided in Michigan.

At some point thereafter, Jasinski, the attorney who was representing the Surrogate Mother in the paternity/adoption action, **changed sides in the middle of the Florida case, began representing the Adopting Mother**, and then on April 14, 1987 filed a petition for the adoption of Infant A. on behalf of the Adopting Mother. The adoption petition did not state the residency of either the Adopting Mother or Infant A., but did state that Infant A. was born just 20 days earlier in Detroit, Michigan. Presented with the adoption petition was a putative consent to adopt purportedly signed by the Surrogate Mother in Michigan, and purportedly witnessed by a Michigan notary and two witnesses in Michigan.

The adoption hearing was originally scheduled for June 5, 1987, but was actually heard five (5) days *earlier* on May 29, 1987. The Surrogate Mother received no notice of the adoption hearing, nor did she receive any other notice in this case. The Surrogate Mother was not at the May 29, 1987 adoption hearing but a fourth attorney, Michel Anderson,[10] was present, purportedly representing the Surrogate Mother. Attorney Jasinski, who had represented the Surrogate Mother earlier in the same case, was present representing the Adopting Couple. The final judgment of adoption was entered the same day as the hearing.

Just seven (7) weeks after the adoption hearing, the Surrogate Mother filed on July 22, 1987 the first of three motions to inspect the file in this case. In the motions, the Surrogate Mother contended, *inter alia*, that: the Florida

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[10] According to the *Miami Review*, dated November 13, 1987, attorney Michel Anderson is stated to have started his own a commercial surrogacy business earlier in March, two months before he appeared to represent the Surrogate Mother. The article reports that Anderson represents only the couples and states, "Anderson and Jasinski have each handled about 60 surrogate adoptions including many out-of-state- ...

courts lacked subject matter *jurisdiction* to enter the adoption judgment, as none of the parties were domiciled in Florida; the Surrogate Mother's consent to adopt was obtained by fraud; the Surrogate Mother was fraudulently represented by attorney Brail; the Surrogate Mother had received no notice regarding the May 29, 1987 adoption hearing; and, the laws of Florida were in conflict with the laws of Michigan. All three motions were denied. None were appealed.

On April 15, 1988, ten (10) months after the adoption judgment was granted, the Surrogate Mother timely filed the Verified Motion for Relief From Judgment (hereinafter, VM). The Surrogate Mother therein explicitly alleged, in pertinent part, that:

> "At no time during the pendency of these proceedings was the infant within the territorial *jurisdiction* of this Court. [VM, p. 2.]
>
> "At the time this action was file, the Petitioner [the Surrogate Father] was a Michigan resident and the Respondents [the Surrogate Mother and her husband] were Michigan residents who were never served with process in connection with this proceeding. [VM, p. 2.]
>
> "Although it appears that [the Surrogate Mother's] signature was affixed to the "Consent," the acknowledgment is false as [the Surrogate Mother] never signed any document in the presence of the notary or the two witnesses. [VM, p. 1.]
>
> "Although [Attorney] Jasinski was supposed to represent [the Surrogate Mother's] interests, at some time subsequent thereto he became counsel for the [Surrogate Father], in this action. [VM, p. 4.]
>
> "Based upon the fraud perpetrated by the [Surrogate Father] herein and through counsel ... and the collusion of

counsel, the "Final Judgment of Adoption" and "Agreed Order Regarding Paternity" should be summarily vacated and set aside. [VM, p. 4.]

"Here, the [Surrogate Father] misrepresented to the Court that the [Surrogate Mother and her husband] have appeared voluntarily and that they have consented to the relief he has sought." [VM, p. 8.]

The Adopting Couple did not answer these statements sworn to be true by the Surrogate Mother.

On oral argument on the motion, the Surrogate Mother' counsel argued:

"Essentially, what we are saying is that the orders which were entered by Your Honor -- and I am sure that it was just an innocent thing relying on lawyers appearing before you, who indicated that they had cases that were resolved, ..." RT, p. 4:8-12.

The Adopting Couple's counsel argued to the trial court judge,

"This 87-9 [an administrative order number] gave this Court *jurisdiction*. You properly entered the order for adoption. It cannot be challenged on that ground, *nor as a matter of fact on any other ground*, which I will be happy to argue when the time comes.[11]" RT, p. 6.

In summarily ruling, the trial judge stated,

"Okay. Mr. Elegant [the Surrogate Mother's attorney], I went through your motion, *detailed* motion.

"*****

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[11] All emphasis is added unless otherwise indicated.

"And I must comment and compliment you, that you did an excellent job in preparation. However, I'm going to deny your motion." RT, p. 9:19-24.

The judge's order denying relief dated May 3, 1988 did not give any reason or grounds for the denial, but merely wrote,

"After hearing argument of counsel *and being otherwise fully advised*, it is ADJUDGED that the said *Verified* Respondent's Motion for Relief From Judgment is DENIED." App., p. A7.

The Surrogate Mother appealed to the District Court of Appeal of Florida, Third District (appellate court), on the grounds, pertinent to this petition, that: the court erred in ruling on the case without giving the Surrogate Mother an opportunity to be heard on whether intrinsic and/or extrinsic fraud occurred in the paternity/adoption proceeding; the Surrogate Mother was a Michigan resident who was never served with process in connection with the paternity/adoption proceeding; and, at no time during the pendency of the proceedings was the infant within the territorial *jurisdiction* of the court.

After oral argument the appellate court ruled "the order and judgment were entered without *jurisdiction* over the subject matter..." and at this juncture footnoted:

"We need not consider the effect of the highly disturbing fact that all of the parties herein: the "surrogate" mother; the "natural" father; his wife, the adoptive mother; and the child were and are residents of Michigan who never so much as set foot in Florida. It is apparent therefore that, for unknown reasons, our courts have been employed as an unwelcome means of promoting the interests of persons who have no contact with this state." App., p. A6.

While the appellate court stated that its ruling was grounded on the trial court judge's lack of subject matter *jurisdiction*, the court footnoted:

> "It may be added that the motion was apparently also properly based on allegations of extrinsic fraud relating to the sequential representation by the same counsel of, first, the "surrogate mother" and then the adoptive parents. *See* Fla.R.Civ.P. 1.540(b)(3); *DeClaire v. Yohanan*, 453 So.2d 375 (Fla.1984)." App., p. A6.

After ruling that Petitioner's motion for relief from judgment should have been granted, the appellate court footnoted:

> "This was the ruling of a trial judge in an identical prior situation. *Stern v. Whitehead*, No. 86-12060 (Fla. 11th Cir. September 4, 1986) (order granting respondent's motion for relief from judgment and respondent's supplemental motion for relief from judgment)." App., p. 6.

The appellate court ordered that the trial court vacate its order and judgment. The Adopting Couple' motion for the appellate court to rehear the case was denied.

Thereafter, on April 18, 1989 the Adopting Mother filed an amended adoption petition in this same case wherein she admits that she did not become a Florida resident until August 1988, over a year after the adoption judgment was granted.

The Adopting Couple appealed to the Florida Supreme Court (Supreme court), on the grounds that the Florida appellate courts were in conflict on the issue of the judge's subject matter *jurisdiction*, an issued not appealed herein.

In the Surrogate Mother's brief on the merits before the Supreme court, the Surrogate Mother again argued that: all the parties to the case resided in Michigan; the infant was

never within the territorial *jurisdiction* of the court; and, the judgment had been obtained by both intrinsic and extrinsic fraud. For the first time, the Surrogate Mother argued that the trial court had violated 14th Amendment due process by applying the laws of Florida to Michigan residents, when all the events related to the execution of the Surrogate parenting contract occurred in Michigan. The Surrogate Mother thoroughly argued that the Florida judgment of adoption could not have been obtained in Michigan as the adoption laws of Florida starkly and irreconcilably conflict with the adoption laws of Michigan.

The supreme court granted permission for *Amicus Curiæ*, the Foundation on Economic Trends, parent organization for the National Coalition Against Surrogacy, to file a brief in this case. *Amicus Curiæ* brought to the court's attention and thoroughly briefed the issue of obtaining personal *jurisdiction* by fraud and the State's due process obligation to apply the law of the state which had some relationship to the litigation.

In ruling, the Supreme Court of the State of Florida footnoted, in pertinent part:

> All documents pertaining to this adoption were executed in Michigan, and the child was born in Michigan. The petition for adoption was silent on the residence of the parties, but because of the foregoing it appears that all are Michigan residents. The issue of the *jurisdiction* of the Florida courts to consider the adoption was not raised. § 63.185, Fla.Stat. (1987), enacted subsequent to these proceedings, would clearly proscribe this in the future."[12]

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[12] Evidently the court chose to ignore Fla.Stat. § 61.1308 which provides that a court has *jurisdiction* over custody matter only if the state is the home state of the child, or the child resided within the state within 6 months, or a parent continues to live in the state. It is obvious that an adoption cannot take place unless somebody within the state consents, and therefore the threshold question in adoption proceedings is custody and *jurisdiction* which should have been addressed under existing Florida law.

App., p. A2.

> "The only argument presented at the trial court level was the defect in the assignment of Judge Swanko. We therefore choose to limit this opinion to the *de facto* judge issue and not to address any other points now raised by the parties." App., p. A4.

The Surrogate Mother sought a rehearing, reminding the Supreme court that the Surrogate Mother had in paragraph 5 and 6 of its original verified motion for relief from judgment alleged respectively that, "At the time this action was filed, the [Surrogate Father] was a Michigan resident and the [Surrogate Mother and her husband] were Michigan residents who were never served with process in connection with this proceeding," and that, "At no time during the pendency of these proceedings was the infant within the territorial *jurisdiction* of the court." [Motion for Rehearing, p. 4.]

The Surrogate Mother also reminded the Supreme Court that her motion, from its inception and at all stages of the proceedings, timely alleged intrinsic fraud relating to the consent to adopt document, and extrinsic fraud relating to the attorney who represented the Surrogate Mother and then changed sides in the middle of the case and began representing the opposing side. The Supreme court was informed that its failure to remand the case denied the Surrogate Mother any opportunity to present evidence regarding the fraud, as the trial judge had summarily denied the motion for relief from judgment.

The Surrogate Mother's motion for rehearing was denied without comment by the Florida court on April 2, 1990.

SUMMARY OF ARGUMENTS IN SUPPORT OF GRANTING THE WRIT

1. Whether exercising personal or subject matter

jurisdiction over non-residents which appears to have been obtained by fraudulent consent requires a court to decline to hear the case presents an important federal question not previously decided by this court, and in view of the fact that the state court has departed from well settled jurisdictional principles laid down by this court, there is presented an issue of grave importance for respect and confidence in the integrity of the judicial system that this court should hear and decide the case. The issue was clearly raised below, and while the decision does not conflict with any decision directly on point in this court, still it does depart from general principles laid down by this court where there appears to have been fraud and collusion, such that the court was obliged to either set aside the judgments, or grant an evidentiary hearing.

2. Whether the Florida Court has departed from fundamental principles of 14th amendment due process set down by this court by refusing either to set aside the judgment or grant an evidentiary hearing where the uncontested evidence demonstrates that the judgment was obtained by fraud, presents an important federal question, which deserves this court's attention. Clearly, petitioner raised the issue at every conceivable stage of the proceedings, notwithstanding the Florida Court's opinion to the contrary, and Florida case law clearly requires an evidentiary hearing on allegations of fraud such as raised below. Moreover, this court has long recognized the right to challenge the jurisdiction of the court where fraud is alleged. Under the circumstances, the court's refusal to either vacate the judgment, or grant an evidentiary hearing on the question appears to have denied petitioner due process of law, such that the questions presented need to be reviewed and passed upon by this court.

3. Whether applying Florida law in derogation of Michigan law in the adoption proceedings below usurps the sovereign authority of Michigan to decide the parental status of Michigan Citizens conflicts with long-established principles of this court, and or presents an important federal issue not

previously, but should now be, decided by this court, and in view of the grave consequences which flow from the potential of undermining respect for sister state sovereignty, the case warrants review by this court. The issue was not waived because timely raised under Florida law. Applicable Florida law conflicts in a material way by virtue of the means by which consent for adoption is obtained, that, in the absence of any interest of Florida in the parties and subject matter, Michigan Law should have been applied. It therefore requires review by this court to insure that the sovereignty of Michigan is not usurped or impaired by Florida Courts.

4. This court urgently needs to address each of the foregoing issues raised in the processing of surrogate parenting contracts in forum states other than the domicile of the parties and subject matter to ensure that there is some nexus between the forum and parties in order to protect the sovereignty of sister states in fulfilling their sovereign obligation to provide police protection for their citizens.

REASONS FOR GRANTING THE WRIT

I

WHETHER EXERCISING PERSONAL/SUBJECT MATTER *JURISDICTION* OVER NON-RESIDENTS WHICH APPEARS TO HAVE BEEN OBTAINED BY FRAUDULENT CONSENT REQUIRES A STATE COURT TO DECLINE TO HEAR THE CASE PRESENTS AN IMPORTANT FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT, AND IN VIEW OF THE FACT THE STATE COURT HAS DEPARTED FROM WELL-SETTLED *JURISDICTIONAL* PRINCIPLES LAID DOWN BY THIS COURT, THERE IS PRESENTED AN ISSUE OF GRAVE IMPORTANCE FOR RESPECT AND CONFIDENCE IN THE INTEGRITY OF THE JUDICIAL SYSTEM THAT THIS COURT SHOULD HEAR AND DECIDE THE CASE.

A. PETITIONER RAISED THE ISSUES OF SUBJECT MATTER *JURISDICTION* AND PERSONAL *JURISDICTION* AT ALL JUDICIAL LEVELS, AND ASSUMING ARGUENDO THAT THE ISSUES WERE NOT RAISED, FLORIDA STATUTORY AND CASE LAW PERMITS THEM TO BE RAISED FOR THE FIRST TIME AT THE SUPREME COURT LEVEL.

The Surrogate Mother argued at all judicial levels that the Florida court lacked subject matter *jurisdiction* and explicitly stated that "the infant was never within the territorial *jurisdiction* of Florida."

The memorandum in support of the verified motion starts out:

> "[The Surrogate Mother and her husband] are clearly entitled to relief from the "Agreed Order Regarding Paternity" and "Final Judgment of Adoption" entered herein because the Court lacked the jurisdiction to enter same and because of the fraud and collusion which permeate said Orders." VM, p. 5.

In support thereof, the memorandum in support of the Verified Motion cites Florida Rule of Civil Procedure, Rule 1.540(b)(3), dealing with fraud. The memorandum continues on a number of grounds, aside from the right of Judge Swanko himself hearing the case, going through each element wherein *jurisdiction* is alleged to be lacking, dwelling at length on fraud. VM, p. 5. And Judge Swanko stated for the record that he had fully read the detailed memorandum. RT, p. 3:9, 9:19-24. Counsel for Petitioner pointed out, with as much tact as possible, that he did not impute the fraud to the judge. RT, p. 4:8-12.

The appellate court raised the issue of subject matter

jurisdiction over the infant by deciding that the issue of whether Florida courts had subject matter *jurisdiction* over non-resident parties who had no contact with the state of Florida was *moot*, given that the appellate court had ruled that the judge lacked subject matter *jurisdiction*. Undeniably, the issue was made clear in the Florida Supreme Court. Petitioner's Petition for Rehearing, p. 2.

Florida Rules of Civil Procedure, Rule 1.140(b) expressly provides, "Any ground not stated shall be deemed to be waived except any ground showing that the court lacks *jurisdiction* of the subject matter may be made at any time." Thus, the supreme court had no independent or adequate state grounds for choosing not to address the issue of subject matter *jurisdiction* over the infant.

The Surrogate Mother informed the court at all judicial levels that the Surrogate Mother had never been served with notice of process and that the Adopting Couple and their counsel had fraudulently represented to the court that the Surrogate Mother had appeared voluntarily and consented to the relief sought. The Surrogate Mother's basic and fundamental argument throughout the entire proceedings revolved around her argument that the attorneys hired by the Adopting Couple to represent her, actually connived with the Adopting Couple's counsel to defeat her rights and appeared on her behalf for that purpose. The fraudulent appearance by the Adopting Couple's attorney on behalf of the Surrogate Mother was the only basis for the courts personal *jurisdiction*.

Even if the Surrogate Mother is found not to have raised the issue of personal *jurisdiction*, lack of personal *jurisdiction* is a constitutional due process error which can be raised for the first time on appeal under Florida law. *D'Oleo-Valdez v. State*, *supra*. The issue of obtaining personal *jurisdiction* by fraud was thoroughly briefed by *amicus curiæ*.

Waiver of a federal right is a federal question which this

court reviews *de novo*. *Ake v. Oklahoma*, 470 U.S. 68 (1986). On the basis of the record below, there is a sufficient record for this court to find that there was in fact no waiver.

B. FLORIDA'S EXERCISE OF *JURISDICTION* OVER THE PARTIES AND THE INFANT WHO WAS NEVER WITHIN THE TERRITORIAL *JURISDICTION* OF FLORIDA CONFLICTS WITH DECISIONS OF THIS COURT AND FLORIDA'S OWN CHILD CUSTODY *JURISDICTION* LAWS.

Traditional notions of fair play and fundamental fairness have dictated that a person have actual notice and an opportunity to defend. *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714. Minimum contacts has been the hallmark for the exercise of jurisdiction of non-resident litigants. *Shaffer v. Heitner*, 433 U.S. 186 (1977). Consent to a particular forum where none of the parties reside, and which by traditional tests would not be a proper forum, has been accorded only in those unique circumstances where the chosen forum has some special expertise with respect to the subject matter. *Eg., The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1971) (English forum good because of English expertise on maritime law).

None of the factors used to determine fairness, as established by decisions of this Court, were present in this case when Florida exercised *jurisdiction* over the Surrogate Mother. The Adopting Couple presented no evidence to establish that the Surrogate Mother had minimum contacts with Florida, or that she purposefully availed herself of the privilege of conducting activities within Florida, or that she could have foreseen that Florida would be exercising *jurisdiction* over her. *Shaffer v. Heitner*, 433 U.S. 186 (1977); *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *Hanson v. Denckla*, 357 U.S. 235 (1958); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In fact, the only evidence, documentary and testimonial, demonstrate

quite the contrary. All the parties resided in Michigan, the contract was signed in Michigan and Infant A. was born in Michigan. The contract even recites Michigan law as controlling paternity. The Surrogate Father even admitted in the Michigan paternity suit, filed 4 months *after* the Florida paternity/adoption action was initiated that he resided in Michigan. And there certainly was no showing that Florida has some special expertise in paternity/adoption law beyond any other state court to justify its exercise of jurisdiction where there was no intent of the parities to do so. *Eg., The Bremen v. Zapata Off-Shore Co., supra*, 407 U.S. 1.

Florida statute § 61.1308(1)(a)1. and 2., which adopts the Uniform Child Custody *Jurisdiction* Act, reads, "Court of this state which is competent to decide child custody matters has *jurisdiction* to make a child custody determination by initial or modification decree if: This State: is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within 6 months before commencement of the proceeding..."

At the time the paternity/adoption proceeding was commenced on August 4, 1986, Infant A. resided in the two (2) month's pregnant body of the Surrogate Mother, whose home state was Michigan.

It is clear therefore that not only does the Florida court depart from principles laid down by this court, but it even departs from its own law which is part of a Uniform Law adopted by 49 states.

C. EXERCISING PERSONAL *JURISDICTION* BASED ON CONSENT OBTAINED BY FRAUD AND COLLUSION CONFLICTS WITH WELL AND LONG SETTLED PRINCIPLES OF THIS COURT, FLORIDA LAW, AND ETHICAL CANONS ESTABLISHED FOR ATTORNEY CONDUCT.

Where *jurisdiction* is based on fraud and collusion, a party is entitled to have the resulting judgment set aside. *Michaels v. Post*, 88 U.S. (21 Wall.) 398, 426-27 (1874); *In re Lennon*, 166 U.S. 548, 552-53 (1896).

The fraud in obtaining personal *jurisdiction* was committed, if at all, upon not only the Surrogate Mother, but on the Sovereignty of Michigan, and upon the courts of Florida as well. A leading case on *jurisdictional* fraud *Staedler v. Staedler*, 78 A.2d 896, 28 ALR 2d 1291 (N.J. 1951) presented facts strikingly similar to the instant case. A husband and wife entered into an agreement, drafted by his attorney, regarding the disposition of their marital assets. The husband, who resided in New Jersey with his wife, then hired and paid for an attorney in Florida to represent her in divorce proceedings instituted in Florida. The husband mailed the wife documents which authorized the attorney selected by him to represent her in Florida, and requested that she execute them. She did so in accordance with their agreement, which required her to execute any document necessary to give full force and effect to said agreement. The wife then retained truly independent counsel (a fact not present in the instant case) in New Jersey. The New Jersey Supreme Court found that,

> "Unquestionably [the divorce] was the product of fraud upon the *jurisdiction* of Florida in which both the appellant and Respondent participated and this fraud had its inception and is grounded in the agreement..." 78 A.2d 901.

and further held that the appearance of the Florida attorney hired and paid for by the husband to represent the wife was in reality an appearance by said attorney as an agent for the husband and not an appearance on behalf of the wife. In refusing to enforce the Florida decree the court stated,

> "...we do not believe that the full faith and credit clause of the Federal Constitution was ever intended to be used

> as a shield for ... or to approve the acts performed pursuant thereto in cases where the ultimate purpose was to commit a fraud upon the *jurisdiction* of acourt of one of the several sovereign states." 78 A.2d 901.

The facts in the instant case are even more egregious than those in *Staedler, supra*, in that the Adopting Couple and their counsel committed fraud not only upon the Sovereignty of Michigan and Florida courts, but also upon the Surrogate Mother. In *DeClaire v. Yohanan*, 453 So.2d 375 (Fla. 1984) the Florida Supreme Court followed the ruling in the *seminal* case on fraud, *United States v. Throckmorton*, 98 U.S. 61 (1878) wherein the court *held*,

> "Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent as...where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat...[showing] that there has never been a real contest in the trial or hearing of the case..."

the judgment may be set aside. The fraud within the surrogacy scheme here is pervasive, beginning with the surrogacy contract, which the mother is deceived into believing is enforceable, and ending with a judgment of adoption procured by attorneys hired by the Adopting Couple to allegedly represent the Surrogate Mother's interest, but in reality are agents of the couple conniving to defeat the rights of the natural mother.

Florida provides, in adoption proceedings, that "(4) The consent shall be executed *only after the birth* of the child in the presence of two witnesses, and be acknowledged before a notary public." Fla.Stat. § 63.082. In this case, the record clearly shows that the Contract was executed before birth, and therefore the Adopting Mother had a clear and present right after the birth to recant.

The Florida Bar's Code of Professional Responsibility, DR-105 (B), (C) and (D), without question proscribes attorney Jasinski's conduct in representing the Surrogate Mother and then the Adopting Couple in the same case, unless it is obvious that he can adequately represent the interests of each party and the parties have consented to such after full disclosure of the possible effects of such. The facts in this case quite dramatically illustrate just how obvious it is that a single attorney cannot represent both the interests of a natural mother and the adopting mother in a surrogacy arrangement. No evidence was presented to establish that the Surrogate Mother consented to the sequential representation or that she was fully advised of how such could affect her case. Just last year in *The Florida Bar v. Stone*, 538 So.2d 460 (1989) the Florida supreme court held that engaging in dual representation of clients with conflicting interests warrants public reprimand. Except in exceptional circumstances, an attorney may not represent conflicting interests in the same general transaction no matter how well-meaning his motive or however slight such adverse interest may be, and that rule is rigid. *The Florida Bar v. Moore*, 194 So.2d 264 (1966). Here the parties were involved in a surrogate parenting contract,a social arrangement ripe with potential conflict from its inception.

Given the serious challenges of fraud, not contested, concerning both non-resident parties and a non-resident subject matter, the court's failure to set aside the judgment, or permit evidence clearly departs from past principals laid down by this court, although the precise issue as applied to parenting statutes has never, but should be, decided by this court in light of the arguments hereinafter.

II

WHETHER THE FLORIDA COURT HAS DEPARTED FROM FUNDAMENTAL PRINCIPLES OF 14TH AMENDMENT DUE PROCESS SET DOWN BY THIS COURT BY REFUSING EITHER TO SET ASIDE THE

JUDGMENT OR GRANT AN EVIDENTIARY HEARING WHERE THE UNCONTESTED EVIDENCE DEMONSTRATES THAT THE JUDGMENT WAS OBTAINED BY FRAUD, PRESENTS AN IMPORTANT FEDERAL QUESTION, WHICH DESERVES THIS COURT'S ATTENTION.

A. PETITIONER APPEALED THE TRIAL COURT'S FAILURE TO GRANT AN EVIDENTIARY HEARING ON THE ISSUE OF FRAUD AT ALL JUDICIAL LEVELS BELOW.

At every judicial level the Surrogate Mother raised the issue of fraud and the trial court's summary ruling on the issue without an evidentiary hearing. The Surrogate Mother exhaustively briefed case law on this issue at both the appellate court and supreme court levels. Memorandum to Verified Motion, p. 7, *citing Pelekis v. Florida Keys Boys Club*, 302 So.2d 447 (Fla. 3d DCA, 1974); Appellant's Initial Brief, p. 9; Petition for Rehearing, p. 2.

B. THE STATE OF FLORIDA'S OWN LAWS REQUIRE THE TRIAL COURT TO GRANT AN EVIDENTIARY HEARING WHERE ISSUES OF FRAUD ARE ALLEGED, AND ASSUMING ARGUENDO THAT FLORIDA LAW DOES NOT REQUIRE SUCH, FEDERAL DUE PROCESS, FAIRNESS AND SUBSTANTIAL JUSTICE DOES REQUIRE THAT PETITIONER BE GIVEN HER DAY IN COURT.

The trial court herein denied the motion for relief from judgment despite the fact that the only evidence presented, documentary and testimonial, oozed with attorney conduct ripe for fraud. The Adopting Couple didn't even bother to file an answer or present any evidence to the contrary. Yet, the trial court judge summarily denied the motion without even the slightest investigation into the issue of fraud. Florida case law holds that if the basis for a motion to vacate a final

judgment is fraud, such an allegation is so serious that a complete explanation of the circumstances of the alleged wrong is required, and therefore, merits a full opportunity to present all the available facts to the court. *Pelekis v. Florida Keys Boys Club*, (Fla.App. 1974) 302 So.2d 447 [trial court erred in denying a motion to vacate where court refused to permit depositions or handwriting samples when fraud was alleged]. In the instant case, the Surrogate Mother has sworn that she did not sign any document in front of witnesses or a notary, yet the signature on the consent to adopt has not been investigated to determine if it is in fact the Surrogate Mother's.

The mere fact that the Surrogate Mother had signed the Surrogate parenting contract does not mean that a hearing on the fraud issue was unnecessary because she was already obligated to consent to the adoption by virtue of the Surrogate parenting contract, as nothing in the pleadings, or for that matter any law at all, establishes that the Surrogate Mother was legally obligated to do so. *Whitaker v. Powers*, (Fla.App. 1982) 424 So.2d 154 [court erred in granting judgment of the pleadings in a fraud action; court rejected argument that alleged fraudulent statements only induced defendant to do what shewas already obligated to do, i.e. pay her bills]. Indeed, under Florida law, the consent was required to be signed only after birth, and by inference one signed before birth is unenforceable. Fla. Stat. § 63.082(4).

Allegations of fraud raise issues of fact, particularly in this case where the record demonstrates attorney misconduct in dually representing parties with conflicting interests. Under Florida law, fraud is not ordinarily a subject for summary judgment and, "It follows that where there are allegations of fraud, judgment on the pleadings seems even more inappropriate since no evidence is considered by the court in rendering its decision." *Farag v. Nat. Databank Sub., Inc.*, 448 So.2d 1098 (Fla. App. 2 Dist. 1984); *Levey v. Getelman*, 408 So.2d 663 (Fla.App.3d 1981). Thus the trial court in this case inappropriately rendered its decision based on only the pleadings

and in face of substantial evidence demonstrating fraudulent attorney conduct.

Because traditional notions of fair play and fundamental fairness dictate that a person have actual notice and an opportunity to defend, *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, and a party has a right to set aside a judgment procured by fraud and connivance, *Michaels v. Post*, 88 U.S. (21 Wall.) 398, 426-27 (1874); *In re Lennon*, 166 U.S. 548, 552-53 (1896), due process appears to require that the trial court either grant the motion based on the uncontested pleadings, or set the matter for an evidentiary hearing, but it requires this court to finally settle the matter.

C. THE TRIAL COURTS FAILURE TO GRANT AN EVIDENTIARY HEARING CONSTITUTED CONSTITUTIONAL AND FUNDAMENTAL ERRORS WHICH CANNOT BE WAIVED UNDER FLORIDA LAW.

In a long line of cases the Florida Supreme Court has held that Constitutional and fundamental errors can not be waived. Fundamental error has been described as an error tha. "goes to the foundation of the case or goes to the merits of the cause of action." *Clark v. State*, 363 So.2d 331, 333 (Fla. 1978). Failing to grant an evidentiary hearing on the issue of fraud, the heart of the Surrogate Mother's case, obviously strikes at the foundation and merits of the Surrogate Mother's motion for relief from judgment. Furthermore, the supreme court has said, that "for the error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process." *Ray v. State*, 403 So.2d 956, 960 (Fla. 1981). The trial court's summary judgment without an evidentiary hearing denied the Surrogate Mother an opportunity to be heard, a fundamental precept to due process. Just 15 months prior to the supreme court decision in this case, the supreme court reaffirmed the above stated cases and principles therein in *D'Oleo-Valdez v.*

State, 531 So.2d 1347 (Fla.1988).

This court has recognized that the failure in a particular case to follow precedent which has been, but for the single instance, consistently and uniformly followed, represents a denial of due process of law under the 14th Amendment. *Johnson v. Mississippi*, 108 S.Ct. 1981 (1988) (Failure to follow regularly and consistently state default law).

III

WHETHER APPLYING FLORIDA LAW IN DEROGATION OF MICHIGAN LAW IN THE ADOPTION PROCEEDING BELOW USURPS THE SOVEREIGN AUTHORITY OF MICHIGAN TO DECIDE THE PARENTAL STATUS OF MICHIGAN CITIZENS CONFLICTS WITH LONG-ESTABLISHED PRINCIPALS OF THIS COURT, AND/OR PRESENTS AN IMPORTANT FEDERAL ISSUE NOT PREVIOUSLY, BUT SHOULD NOW BE, DECIDED BY THIS COURT, AND IN VIEW OF THE GRAVE CONSEQUENCES WHICH FLOW FROM THE POTENTIAL OF UNDERMINING RESPECT FOR SISTER STATE SOVEREIGNTY, THE CASE WARRANTS REVIEW BY THIS COURT.

A. PETITIONER DID NOT WAIVE THIS ISSUE OF DUE PROCESS AS IT WAS RAISED AT THE FLORIDA SUPREME COURT LEVEL AS PERMITTED BY FLORIDA LAW.

At the Florida Supreme court level the Surrogate Mother, briefed, with statutes and case law, the due process violation that occurred when Florida applied its own law rather than the law of Michigan. As noted above, Florida law permits litigants to raise issues of due process for the first time at the supreme court level. *D'Oleo-Valdez v. State*, *supra*. Application of the wrong law is one of the most fundamental of errors a court can make, for application of Florida law in this case

permitted the judgment whereas Michigan law would have forbidden it.

B. APPLICABLE FLORIDA LAWS IN THIS CASE CONFLICT SO DRASTICALLY AND IRRECONCILABLY WITH MICHIGAN LAW THAT THE FLORIDA JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

Under Michigan law the mother must be informed of her legal rights by a judge or referee before her consent to adopt can be executed. Michigan Adoption Code § 710.44(5). Even then, the judge must be satisfied that the consent was genuine before the consent can be accepted. Michigan Adoption Code § 710.51(a). By contrast, under Florida law a consent to adopt can be executed by affidavit in the presence of a notary and two witnesses. Sec. 63.084(4), Fla. Stat. The Surrogate Mother's consent to adopt was not taken by a judge after she was told what her legal rights were. The last thing the Adopting Couple would want the Surrogate Mother to know is that she did not have to consent to the adoption even though the surrogacy arrangement contemplated such.

The Adopting Couple's selection of Florida for procuring the adoption contemplated by the surrogacy contract represents the most blatant form of forum shopping. The natural mother's consent to adopt must be quickly obtained before she has any time to discover her legal rights, as no state permits the enforceability of a pre-birth consent. E.g., Fla.Stat. § 63.082(5); Michigan Adoption Code § 710.34. Moreover, both Michigan and Florida have adopted the Uniform Child Custody Jurisdiction Act which requires that jurisdiction be had solely by a court in a state wherein the child or a parent has resided for six months or more. Fla. Stat. § 61.1308; Michigan Adoption Code § 600.651.

Even more importantly, direct placement of the infant with the adopting couple, as was done in this case, is prohibited in

Michigan, but permitted in Florida. Michigan Adoption Code § 710.41(1) and (4). Because of these conflicts of law, Florida's choice of law must be constitutionally permissible. Michigan Adoption Code and the Florida Adoption Act also conflict in other respects. *Cf*, Michigan Adoption Code § 710.513 *with* § 63.082(5), Fla. Stat.; Michigan Adoption Code § 610.64(1); *with* § 63.085(1)(b), Fla. Stat.; Michigan Adoption Code § 710.41(1), (4) *with* § 63.212(1), (b) Fla. Stat.; Michigan Adoption Code § 710.52 *with* § 63.122(1), Fla.Stat.; Michigan Adoption Code § 710.56(1) *with* § 63.182, Fla. Stat.; Michigan Adoption Code § 710.43(8) *with* § 63.062(1), (a), Fla. Stat.; Michigan Adoption Code § 710.64(1) *with* § 63.082(5), Fla. Stat. Michigan Adoption Code § 710.65(1) *with* § 63.182, Fla. Stat.; Michigan Adoption Code §§ 710.27(1), (7), 710.68(1), (8) *with* § 63.162(4), (a), (b), (c), Fla. Stat.

C. BECAUSE ALL EVENTS GIVING RISE TO THIS LITIGATION OCCURRED IN MICHIGAN AND THE SURROGATE PARENTING CONTRACT RECITES MICHIGAN LAW, THE STATE OF FLORIDA USURPED THE SOVEREIGN AUTHORITY OF MICHIGAN BY APPLYING FLORIDA LAWS AND GRANTING A JUDGMENT WHICH IS IMPERMISSIBLE UNDER MICHIGAN LAW.

Article IV, § 1, requires each state to give full faith and credit to the public Acts, Records, and proceedings in every other state. Moreover, no state may impair obligations of contract pursuant to its own rules and regulations when made in a sister state. U.S. Const., Art. 1, § 10, cl. 1; Art. IV, § 2, cl. 3.

Following a long line of cases this court stated in the leading conflicts of law case, *Allstate Insurance Company* v.

Hague, 449 U.S. 302, 308, 312 (1981),

> "In deciding constitutional choice-of-lawquestions, whether under the Due Process Clause of the 14th Amendment or the Full Faith and Credit Clause under Art. IV, § 1, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation,"

and held

> "[T]hat for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."

In *Allstate*, *supra*, this court reviewed long-held U.S. Supreme Court precedents establishing this rule and described the cases of *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) and *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936) as "extreme examples" where forum states had improperly chose to apply its own laws based on one insignificant forum contact, namely that the parties bringing the suit nominally resided in the *forum* state. In those two cases, as in the instant case, all occurrences or transactions giving rise to the litigation occurred outside the forum state. The instant case is even a more extreme example of lack of contacts with the forum state in that all parties to the litigation have resided in Michigan at all times. And even assuming *arguendo* that the Adopting Couple resides at some point in Florida, such contact would be insignificant considering that every event related to the surrogacy contract occurred in Michigan.

More recently this court *held* in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), that in determining whether the choice of law is arbitrary or fundamentally unfair,

the parties intent to apply a particular state law is an important factor. In this case, the parties intent was to apply Michigan law, as the Michigan statutes regarding paternity were recited verbatim, in the "Refusal to Consent" document signed by the Surrogate Mother's husband, as controlling the paternity of Infant A.

In a case involving an indigent's due process right to counsel in a termination of parental rights proceeding, this court stated that a parent's interest in her child is an "extremely important one." *Lassiter v. Department of Social Services*, 452 U.S. 18, 31 (1981). While finding lack of counsel would not violate due process inevery case the court noted,

> "In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution." *Lassiter*, 452 U.S. 33.

This case expresses the importance and necessity for high due process standards in a termination of parental rights proceedings to ensure fundamental fairness.

Recognizing the very importance of due process in adoption proceedings, the Florida legislature enacted § 63.192, Fla.Stat. which states,

> "A judgment of court terminating the relationship of parent and child or establishing the relationship by adoption issued pursuant to due process of law by a court of any other *jurisdiction*...shall be recognized in this state..."

In *Sherrer v. Sherrer*, 334 U.S. 343, 354 (1948) this court stated, "...that under the Constitution, the regulation and control of marital and family relationships are reserved to the States" and recognized"...the importance of a State's power to

determine the incidents of basic social relationships into which its domiciliaries enter..."

Citing the Fifth Amendment due process clause, the court in *Alton v. Alton*, 207 F.2d 667, 677 (3d Cir. 1953), a leading conflicts of law case, *held*,

> "Domestic relations are a matter of concern to the state where a person is domiciled. An attempt by another *jurisdiction* to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question. The question may well be asked as to what the lack of due process is. The defendant is not complaining. Nevertheless, if the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere..."

The court was referring to the need for states to respect the sovereignty of other states in order to ensure order in a federation of states, also the goal of the Full Faith and Credit Clause.

Because all parties in this case resided in Michigan and all occurrences giving rise to the litigation occurred in Michigan, Florida had no state interest in determining the parental status of the parties involved. Florida "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Phillips Petroleum Company v. Shutts*, 472 U.S., at p. 822, *citing Dick*, *supra*. By applying Florida law, the lower court did not give faith and credit to Michigan laws thereby usurping Michigan's sovereign authority to legislate regarding the termination and creation of parental rights in its citizens.

IV

THIS COURT URGENTLY NEEDS TO ADDRESS THE ISSUES RAISED IN THE PROCESSING OF SURROGATE PARENTING CONTRACTS THROUGH STATES OTHER THAN THE DOMICILE OF THE PARTIES BECAUSE FRAUD, AS DEMONSTRATED IN THIS CASE, WILL ALWAYS BE UNAFFECTED BY LEGISLATION, SUCH THAT THIS COURT MUST GIVE CLEAR GUIDANCE TO THE COURTS AS TO THEIR RESPONSIBILTY WHEN ALLEGATIONS OF FRAUD ARE RAISED IN SURROGACY CASES

Fraud is unaffected by legislation. Florida has had for some time a statute which restricts when its courts may exercise jurisdiction over children and custody questions. Fla.Stat. § 61.1308 (Uniform Child Custody Jurisdiction Act.) That has not deterred the attorneys for the Adopting couple in this case from obtaining jurisdiction in apparent fraud over the Surrogate Mother. Florida's legislation requiring residence and employment therefore does not cure the problem because fraud itself is unaffected by legislation. Moreover, all Florida has done has shifted the problem to some other hapless state and other unsuspecting surrogate mothers, and in derogation of the sovereignty of the respective states. Thus what this court must do now is set forth clear guidelines to the Courts as to their responsibilities when faced with a motion to vacate a judgement in adoption/paternity proceedings on the grounds of fraud.

While Mrs. Foster acted as a surrogate mother, she is none the less a human being, entitled, as any other litigant, to her day in court. She, as all others similarly situtated, urgently need the protection of this court if they are not be further abused by those willing to commit fraud in procurement and distribution of children.

CONCLUSION

WHEREFORE, for all, or any of,the foregoing reasons, this court should grant the writ of certiorari to the Supreme Court of Florida and summarily reverse and remand, or set the matter for briefing and argument, and such other and further relief as the court deems just and proper under the circumstances.

Dated: June 28, 1990

Respectfully submitted,

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APPENDIX

Case Number 73,696

SUPREME COURT OF FLORIDA

January 18, 1990

MICHAEL STEIN,

Petitioner,

vs.

PATRICIA CLARK FOSTER, et al.,

Respondents.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions Third District - Case Nos.88-1448 & 88-1451 (Dade County).

Law Offices of Melvyn B. Frumkes & Associates, P.A., Miami, Florida; and Cynthia L. Greene of the Law Offices of Greene and Greene, P.A., Miami, Florida, for petitioner.

Ira M. Elegant and Carolina A. Echarte of Buchbinder & Elegant, P.A., Miami, Florida, for respondents.

Robert D. Arenstein, New York, New York; and Sharon Huddle DeAngelo, Citrus Heights, California, Amicus Curiae for the Foundation on Economic Trends.

McDonald, J.

We review *Foster v. Stein*, 534 So.2d 1218 (Fla. 3d DCA 1988), because of conflict with *Card v. State*, 497 So.2d 1169 (Fla. 1986),cert. denied, 481 U.S. 1059 (1987). Our *jurisdiction* is based in article V, section 3(b)(3), Florida Constitution. We *hold* that the district court erred in

reversing the trial court's rulings and quash *Foster*.

January 1986 Michael Stein and Patricia Foster executed a surrogate parenting agreement under which Foster agreed to bear Stein's child and then give it to Stein and his wife. A county judge serving as an acting circuit court judge entered an order determining the unborn child's paternity in December 1986.[1] Foster gave birth in March 1987 and turned the child over to the Steins. In May 1987 the same Florida judge granted the petition of Hayat Stein (Michael's wife) to adopt the child. Within a year Foster petitioned for relief from the judgment of adoption, alleging, among other things, that the administrative order assigning the county judge to the circuit court did not authorize him to enter a final judgment of adoption. The same judge who heard the earlier proceedings denied the petition. The district court reversed, voided the lower court's rulings, and held that "the county judge who executed the order and judgment was never appropriately assigned to the cause as an acting circuit judge." 534 So.2d at 1218.

As authorized by article V, section 2(b), Florida Constitution, and rule 2.050(b)(4), Florida Rules of Judicial Administration, by administrative order no. 86-149, November 10, 1986, Chief Judge Wetherington appointed seventeen county court judges to the circuit court

> "to temporarily serve as Acting and Temporary judges of the FAMILY CIVIL DEPARTMENT of the circuit Court, to hear, try, conduct, determine dispose of those cases assigned to them by the Associate Administrative

---

[1] A Michigan court entered a similar order in January 1987. All documents pertaining to this adoption were executed in Michigan, and the child was born in Michigan. The petition for adoption was silent on the residence of the parties, but because of the foregoing it appears that all are Michigan residents. The issue of the *jurisdiction* of the Florida courts to consider the adoption was not raised. § 63.185, Fla. Stat. (1987), enacted subsequent to these proceedings, would clearly proscribed this in the future.

Judge of the Family vision of the Circuit Court, effective through December 1, 1986, and inclusive of December 31, 1986, and thereafter to dispose of all those matters considered by them during said period.

The named judges include Edward H. Swanko, the judge who presided over this case. On April 24, 1987 Judge Wetherington issued administrative order no. 87-59, substantively the same as order no. 86-149, covering the month of May 1987. Foster argues that, because the associate administrative judge of the family division did not assign her case to Judge Swanko specifically,[2] had no *jurisdiction* to hear it.

Even assuming that Judge Swanko had not been assigned specifically to the instant case,[3] we find the district court's voiding of his orders unwarranted. Judge Wetherington's orders validly made Judge Swanko an acting circuit court judge with the power to hear any case properly in the circuit court and within the scope of the administrative orders. Under those orders Judge Swanko "was in peaceful position, discharging his official dutiesin view of the public, with public acquiescence, and without the slightest appearance of a usurper." *State ex rel. Hawthorne v. Wiseheart*, 158 Fla. 267, 273, 28 So.2d 589, 593 (1946). It appears that Judge Swanko was, at the very least, a *de facto* circuit judge.

A *de facto* judge functions under color of authority even though that judge's actual authority suffers from some procedural defect. *Card*. Public policy and necessity, to protect the interest of the public and others dealing with a *de facto* officer, mandate adoption of the *de facto* doctrine. *Wiseheart*.

---

[2] The record does not contain any such order, and Foster alleges that none exists.

[3] We do not reach the question of whether a showing that Judge Swanko had been assigned the case according to procedures dictatedby the administrative judge would supplant the necessity of a written order specifically assigning the case to him.

By ignoring the de facto doctrine and voiding Judge Swanko's orders the district court has, in essence, also voided orders entered by theother judges assigned to the circuit court.[4] The family division,to which these judges were assigned, deals with delicate andsensitive matters. Casting doubt on the finality, the very legitimacy, of the orders entered by Judge Swanko and the other judges does not protect or well serve the interests of the public.

We *hold*, therefore, that Judge Swanko was a *de facto* judge. A *de facto* judge's acts are valid. *Card*. An objection to a de facto judge's authority to serve must be timely made. At the latest this should be before the final judgment is entered in the action.[5] Because Foster did not object in a timely manner, Judge Swanko's orders should not be vacated on the grounds that he lacked capacity to act as a circuit judge.[6] Therefore, we quash the district court's decision and remand with directions to affirm Judge Swanko's rulings in this case.

It is so ordered.

EHRLICH, C.J., and OVERTON, SHAW, BARKETT, GRIMES and KOGAN, JJ.,Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTON AND, IF FILED, DETERMINED.

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[4] At oral argument Foster's counsel stated that he had looked at the circuit court's records and that hundreds of orders might be affected by the district court's ruling.

[5] This is consistent with § 38.06, Fla. Stat. (1987), dealing with the effect of disqualification of judges.

[6] The only argument presented at the trial court level was the defect in the assignment of Judge Swanko. We therefore choose to limit this opinion to the *de facto* judge issue and not to address any other points now raised by the parties.

534 So.2d 1218

Case Number Nos. 88-1448, 88-1451

APPELLATE COURT OF FLORIDA

THIRD JUDICIAL DISTRICT

October Term 1988

MICHAEL STEIN,

Petitioner,

vs.

PATRICIA CLARK FOSTER, et al.,

Respondents.

Dec. 6, 1988

Rehearing Denied Jan. 11, 1989.

Appeals from the Circuit Court for Dade County; Edward H. Swanko,Judge.

Buchbinder & Elegant and Ira Elegant, Miami, for appellants.

Frumkes and Greene and Cynthia Greene, Miami, for appellee.

Before SCHWARTZ, C.J., and BASKIN and JORGENSON, JJ.

SCHWARTZ, Chief Judge.

The issue in this case concerns the viability of a

finaljudgment of adoption and the agreed order regarding paternity upon which it was based. A careful review of the pertinent orders of the Chief Judge of the eleventh Circuit clearly reveals that the county judge who executed the order and judgment was never appropriately assigned to the cause as an acting circuit judge. Since only the circuit court, acting through a duly qualified circuit judge, has jurisdiction in paternity and adoption proceedings, Art. V, § 5(b), Fla. Const., the order and judgment were entered without jurisdiction over the subject matter[7] and are totally void. *Caudell v. Leventis*, 43 So.2d 853 (Fla. 1950); *Corak Constr. Corp. v. Scott*, 184 So.2d 460 (Fla. 3d DCA 1966), *cert.denied* 189 So.2d 633 (Fla 1966). On that ground,[8] the appellants' motion under Florida Rule of Civil Procedure 1.540(b)(4) for relief from the order and judgment as void should have been granted. *See Gelkop v. Gelkop*, 384 So.2d 195 (Fla. 3d DCA 1980); *Osceola Farms Co. v. Sanchez*, 238 So.2d 477 (Fla. 4th DCA 1970)." [9] The cause is therefore remanded with directions to vacate the order and judgment.

---

[7] We need not consider the effect of the highly disturbing fact that all of the parties herein: the "surrogate" mother; the "natural" father; his wife, the adoptive mother; and the child were and are residents of Michigan who never so much as set foot in Florida. It is apparent therefore that, for unknown reasons, our courts have been employed as an unwelcome means of promoting the interests of persons who have no contact with this state.

[8] It may be added that the motion was apparently also properly based on allegations of extrinsic fraud relating to the sequential representation by the same counsel of, first, the "surrogate mother" and then the adoptive parents. See Fla.R.Civ.P. 1.540(b)(3); *DeClaire v. Yohanan*, 453 So.2d 375 (Fla.1984).

[9] This was the ruling of a trial judge in an identical prior situation. *Stern v. Whitehead*, No. 86-12060 (Fla. 11th Cir.September 4, 1986) (order granting respondent's motion for relief from judgment and respondent's supplemental motion for relief from judgment).

[10] The county judge was properly assigned to hear the Rule 1.540 motion itself.

CASE NO. 86-42848 FC (16)

IN THE CIRCUIT COURT OF DADE COUNTY, FLORIDA

CASE NO. 86-42848 FC (16)

In re: The Adoption of

[A.] [H.] STEIN

ORDER DENYING MOTION FOR

RELIEF FROM JUDGMENT

THIS CAUSE came on to be heard before me upon the VerifiedRespondent's Motion for Relief From Judgment filed herein on behalfof PATRICIA (CLARK) FOSTER and BRENT FOSTER, her husband. After hearing argument of counsel and being otherwise fully advised, it is

ADJUDGED that the said Verified Respondent's Motion for Relief From Judgment is DENIED.

ORDERED at Miami, Florida this 3 day of June, 1988.

s/Edward H. Swanko, Judge
CIRCUIT JUDGE

No. 90-40

In The

Supreme Court of the United States

October Term, 1989

PATRICIA C. FOSTER and BRENT FOSTER,

Petitioners,

vs.

MICHAEL STEIN and HAYAT STEIN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether the Petitioners raised and preserved a federal or constitutional question when neither the pleadings at the trial court level nor the questions presented to the District Court of Appeal of Florida, Third District, mentioned a federal question or a constitutional issue?

2. Whether the decision rendered by the Supreme Court of Florida was grounded upon state law having no relationship to any federal or constitutional question?

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[1] The Respondents wish to state the Questions Presented differently from those which have been presented by the Petitioners.

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No. 90-40

In The

Supreme Court of the United States

October Term, 1989

PATRICIA C. FOSTER and BRENT FOSTER,

Petitioners,

vs.

MICHAEL STEIN and HAYAT STEIN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Florida

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The Respondents agree with the Petitioners' summary of the opinions below.

JURISDICTION

The Petitioners improvidently and erroneously attempt to invoke the jurisdiction of this Court.

The failure of the Petitioners to raise and preserve the now alleged federal and constitutional questions in

the Florida courts preclude the Petitioners from seeking relief before this Court; there is no jurisdiction in this Court.

STATEMENT OF THE CASE[2]

The Respondent, Michael Stein, is the natural father of Andrew Hyde Stein, a minor child born in 1987. The Petitioner, Patricia Foster, is the natural mother.[3] The child was conceived through artificial insemination under the term of a "Surrogate Parenting Agreement" entered into between the Michael Stein and Patricia Foster in 1986.

When Patricia Foster became pregnant in late 1986, Michael Stein filed a "Petition for Declaratory Relief" in the Circuit Court in and for Dade County, Florida, seeking an adjudication of his paternity of the then unborn child carried by Patricia Foster. (App. 1-3)

Patricia Foster responded, in the Florida court, with a "Verified Answer" in which she, under oath, admitted that Michael Stein was the father of the unborn child she was carrying. Brent Foster joined in the "Verified Answer", filed in Florida acknowledging that Michael Stein was the father of the child. (App. 4-5)

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[2] The Respondents believe that the following Statement of the Case is necessary to correct inaccuracies and omissions in the Petitioners' Statement.

[3] Brent Foster, also Petitioner herein, is Patricia Foster's husband. Hayat Stein, also Respondent herein, is Michael Stein's wife.

The paternity case filed by Michael Stein in Dade County Florida, was assigned to the Honorable Edward N. Moore, a Circuit Judge of the Circuit Court of Dade County, Florida. At the time, however, the Chief Judge of the Dade County Courts had entered a series of "Administrative Orders" authorizing County Judges to hear and determine certain cases within the Family Division of the Circuit Court.[4] Therefore, pursuant to "Administrative Order", County Judge Edward Swanko, as Acting Circuit Judge, was assigned to this case and, on December 19, 1986, entered an "Agreed Order Regarding Paternity", declaring Michael Stein the father of the child then carried by Patricia Foster.[5] (App. 6-7)

Following the birth of the child in March, 1987, Patricia Foster executed a "Consent for Adoption", consenting to the adoption of the child by Hayat Stein, the wife of Michael Stein. (App. 10) Michael Stein also executed a "Consent for Adoption", agreeing to the stepparent adoption of the child by his wife. (App. 11-12) Simultaneously,

---

[4] Pursuant to Rule 2.050, Florida Rules of Judicial Administration, the chief judge of each judicial circuit within the state of Florida has the authority to appoint County Judges to serve as Acting Circuit Judges for specified periods of time to perform specified services. The authority of the Chief Judge of Dade County, Florida to appoint County Judges as was done in this case was never challenged in the instant case nor is it challenged now.

[5] Subsequently, in January, 1987, an additional order determining Michael Stein's paternity of the child was entered in the State of Michigan. This second paternity adjudication, entitled, "Consent Order Determining Paternity", was entered upon the motion to Patricia Foster. (App. 8-9)

Michael Stein filed a "Petition for [Step-Parent] Adoption" in the Florida Court, attaching thereto the "Agreed Order Regarding Paternity" which established him as the father of the child, and the "Consents for Adoption" executed by Patricia Foster and himself. (App. 13-15)

In May, 1987, the Florida court, again through Acting Circuit Judge Swanko pursuant to "Administrative Order", entered a "Final Judgment of Adoption", authorizing the step-parent adoption of the child by Hayat Stein. (App. 16-17)

One and a half years after the entry of the "Agreed Order Regarding Paternity" and eleven months after the entry of the "Final Judgment of Adoption", Patricia Foster filed, in the Florida court, a "Verified Motion for Relief from Judgment" seeking an order setting aside both judgments. (App. 18-28) She alleged:

1. That although the "Consent for Adoption" executed by her reflects that she signed the consent before a notary and two witnesses, she did not do so;

2. That despite the filing of her "Verified Answer" acknowledging paternity and her sworn "Consent for Adoption", she had never been served with process in connection with the proceedings for paternity or adoption;

3. That the child was never within the territorial jurisdiction of the State of Florida at the time of the adoption and was not born at the time of the paternity adjudication;

4. That she was not represented by independent counsel in the proceedings; and,

5. That County Judge Swanko did not have jurisdiction to enter either the paternity judgment or the adoption judgment as an Acting Circuit Judge because of an alleged "defect" in his assignment under the terms of the "Administrative Order" in effect at the time.

As is clear from the foregoing, the only issues raised by Patricia Foster at the trial court level concerning "jurisdiction" were that she was not served with process; that the child was not within the State of Florida at the time of the adoption; and that County Judge Swanko lacked "jurisdiction" to hear a Circuit Court case because of an alleged "defective" assignment of the case to him. (App. 18-28)

More importantly, Patricia Foster, in her "Motion for Relief from Judgment", made no mention of any federal issue or question and made no mention of or reference to the Constitution of the United States or any federal statute or law.

Patricia Foster, having filed her "Motion for Relief from Judgment", then scheduled and noticed the hearing to be had thereon. She, through her counsel, scheduled the case for hearing; selected the amount of time for the hearing; selected the date and advised counsel for Michael Stein, via a "Notice of Hearing", of the hearing to be had upon her "Verified Motion for Relief from Judgment." (App. 29-30; 31-32) Pursuant to the "Notice of Hearing", the matter to be heard by the court was the "Motion for Relief from Judgment" – not any particular or specific portion of the motion but, rather, the entire motion and all of the allegations made therein.

At the hearing upon her "Motion for Relief from Judgment", however, Patricia Foster presented no evidence with respect to any of the allegations in her motions. She presented no testimony. She did not appear at the hearing nor did any witnesses on her behalf. Instead, she relied solely upon her legal argument, presented through her counsel, that the County Judge, as Acting Circuit Judge, lacked the authority to enter either the paternity or the adoption judgment because of the purported "defect" in his assignment to the case. She did not present any other argument in support of her motion and she did not address any other aspect of the "Motion for Relief from Judgment."

In June, 1988, the trial court denied her "Motion for Relief from Judgment" and Patricia Foster sought review in the District Court of Appeal of Florida, Third District.

In the appellate court, Patricia Foster argued only that the Acting Circuit Judge had been improperly assigned to the case and, therefore, lacked "jurisdiction" to hear the case and that she was entitled to an "evidentiary" hearing upon her allegations of "fraud". Again, as at the trial level, she made no mention of any federal issue or question and made no mention of or reference to the Constitution of the United States or any federal statute or law.

The District Court of Appeal found that the Acting Circuit Judge had been "improperly assigned" to the case and held that because he had "never been appropriately assigned to the cause as an acting circuit judge", he lacked jurisdiction to enter the two judgments in issue.

Following the appellate court ruling, Michael Stein sought review in the Florida Supreme Court.

The Florida Supreme Court accepted jurisdiction to review the case and the issues presented to the Court were:

1. "The District Court of Appeal erred in determining that the County Judge who executed the order and judgment herein was not 'appropriately assigned.' ";

2. "Assuming that the County Judge herein was not 'appropriately assigned', the District Court of Appeal nevertheless erred in determining the order and judgment executed by the County Judge to be 'void.' "

Thus, the questions presented to the Florida Supreme Court were, simply stated, whether there was a "defect" in the assignment procedure whereby the County Judge heard this case as an Acting Circuit Judge and, assuming such a "defect", whether the Acting Circuit Judge was nevertheless a *de facto* judge whose acts were valid.

Although the foregoing were the issues presented to the Florida Supreme Court, Patricia Foster attempted to raise in her responsive brief, for the first time before any Florida court, a "constitutional question", arguing, that the appellate court's decision should be affirmed because the trial court's order denying her "Motion for Relief from Judgment" violated her "Fourteenth Amendment rights" because the trial court applied Florida law instead of Michigan law.

The Florida Supreme Court did not address this issue but, rather, grounded its decision upon Florida law concerning the power and authority of a *de facto* judge. The Florida Supreme Court held:

> Even assuming that [the County Judge] had not been assigned specifically to the instant case, we find the district court's voiding of his orders unwarranted. [The Chief Judge's] order validly made [the County Judge] an acting circuit judge with the power to hear any case properly in the circuit court and within the scope of the administrative orders. Under those orders [the County Judge] "was in peaceful position, discharging his official duties in view of the public, with public acquiescence, and without the slightest appearance of a usurper." State ex. rel. Hawthorne v. Wiseheart, 158 Fla. 267, 273, 28 So.2d 589, 593 (1946). It appears that [the County Judge] was, at the very least, a *de facto* circuit judge.
>
> * * *
>
> We hold, therefore, that [the County Judge] was a *de facto* judge. A *de facto* judge's acts are valid. *Card* [*v. State* 497 So.2d 1169 (Fla. 1986)] An objection to a *de facto* judge's authority to serve must be timely made. At the latest this should be before the final judgment is entered in the action. Because [Patricia Foster] did not object in a timely manner, [the County Judge's] orders should not be vacated on the grounds that he lacked capacity to act as a circuit judge. *Stein v. Foster,* 557 So.2d 861 (Fla. 1980).

Patricia Foster now seeks review in this Court, alleging that the decision of the Florida Supreme Court raises issues of "federal due process."

REASONS FOR DENYING THE WRIT

1. Failure to Raise and Preserve a Federal or Constitutional Question Below

Neither the pleadings at the trial court level nor Petitioners' argument at the district court of appeal level contain any reference to a federal question or a constitutional issue.

Jurisdiction in this Court requires the record below to demonstrate that the constitutional question was both raised and decided by the Florida courts. *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54 (1962).

The procedural history of this case in one of total and complete failure on the part of the Petitioners to preserve the numerous issues which they seek to present to this Court at any judicial level in the State of Florida.

The Petitioners commenced this case at the Florida trial court level by way of a "Motion for Relief from Judgment" alleging "fraud", lack of independent representation by counsel and certain "jurisdictional" grounds – lack of service upon the Petitioners, absence of the child from the state at the time of the adoption and a "defect" in the assignment of the judge who ultimately heard the case.

The Petitioners then scheduled a hearing upon the "Motion for Relief from Judgment" and elected not to present to the trial court any matter other than the purported "defect" in the assignment of the judge assigned to the case. The Petitioners chose not to argue or present any evidence or testimony concerning the allegations of

"fraud" or lack of independent counsel or service of process or the absence of the child from state at the time of the adoption.[6]

More importantly, however, the Petitioners never presented a federal question or constitutional issue to the trial court. To do so, the Petitioners were required to make reference to a particular clause of the United States Constitution or particular statute as well as to the rights claimed thereunder. A mere reference to the "Constitution of the United States" or to the "Constitution and laws of the United States" or "due process of law" is not sufficient. Indeed, a mere reference to a specific amendment to the United States Constitution is insufficient. *See, e.g., Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935); *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897); *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914); *Chapin v. Fye*, 179 U.S.

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[6] The Petitioners' failure to present these arguments may have been a tactical decision as the allegations were insufficient, as a matter of law, to support a request for relief from judgment under Florida law. At the time in question, there was no residency requirement associated with adoption cases. *See*, §63.185, Florida Statutes (1987). Service of process is not required where a party voluntarily submits to the jurisdiction of the court by, as here, filing a "Verified Answer" in the paternity case and a "Consent for Adoption" in the adoption case. *See, e.g., Kirshner v. Shernow*, 367 So.2d 713 (Fla. 3rd DCA 1987). Lack of independent counsel does not provide grounds from relief from judgment. *See, e.g., Bubenik v. Bubenik*, 392 So.2d 943 (Fla. 3rd DCA 1980). And, any alleged defect in the consent for adoption or objection thereto is waived after the expiration of thirty days from the entry of the judgment of adoption. *See*, §63.182, Florida Statutes (1987).

127, 129-30 (1900); *Winous Point Shooting Club v. Caspersen*, 193 U.S. 189 (1904).

Here, the Petitioners made no mention, reference or statement as to any federal question or constitutional issue at the Florida trial court level and, even assuming that the Petitioners' vague references to "jurisdiction" were to somehow be deemed to have raised such a question or issue, the Petitioners' waived any such question or issue by their failure to present such points to the trial court at the hearing upon their "Motion for Relief from Judgment."

Assuming that a federal question or constitutional issue had been framed in this case (which it was not), it is essential to this Court's jurisdiction that it have been raised, presented and pursued in a timely and proper manner at the appropriate point in the state court. *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54 (1962). Under Florida law, the appropriate point was at the trial court level as constitutional issues may not be raised for the first time on appeal. *See, e.g., Atwood v. Hendrix*, 439 So.2d 973 (Fla. 1st DCA 1983); *Hunter v. Employers Mutual Liability Insurance Company of Wisconsin*, 427 So.2d 199 (Fla. 2nd DCA 1983); *Sparta State Bank v. Page*, 477 So.2d 3 (Fla. 5th DCA 1985); *Hegeman-Harris Company, Inc. v. All State Pipe Supply Company*, 400 So.2d 1245 (Fla. 5th DCA 1981).

The trial court denied the "Motion for Relief from Judgment" and the Petitioners sought review of the case in the District Court of Appeal of Florida, Third District. Again, the Petitioners did not raise or present to the

appellate court any federal question or constitutional issue and the appellate court decided the case solely upon the basis of the purported "defect" in the assignment of the judge to the case below.

The case proceeded to the Florida Supreme Court at which point the Petitioners, in contravention of Florida law, attempted to raise, for the first time, a "constitutional issue" by asserting, in their responsive brief, that "the decision of the District Court of Appeal should be approved because the entry of the 'Final Judgment of Adoption' contravenes Foster's Fourteenth Amendment rights of due process, where the lower court applied Florida law instead of Michigan law, even though all of the pertinent acts occurred in Michigan." The Petitioners' now assert to this Court that this statement, made for the first time in these proceedings at the Florida Supreme Court level, was sufficient to raise and preserve a federal question for review by this Court.

The flaws in the Petitioners' argument are obvious: the foregoing statement does not adequately frame a federal or constitutional question and, even assuming that it does, this Court's jurisdiction is dependent upon such question being raised at the appropriate time under state law which, under Florida law, is not the Supreme Court level but, rather, the trial court level.[7]

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[7] The Petitioners' argument that Florida law permits litigants to raise issues of due process for the first time at the Supreme Court level is erroneous. The case cited by the Petitioners for this statement, *D'Oleo-Valdez v. State*, 531 So.2d 1347 (Fla. 1988), does not so hold but, rather, opines that fundamental error amounting to a denial of due process may be raised

(Continued on following page)

Further, the Petitioners attempt to raise the "constitutional question" was made for the first time in their *responsive* brief in the Florida Supreme Court. The Petitioners here were not the moving parties in the Florida Supreme Court but, rather, were defending the decision of the district court of appeal. They did not file a cross-appeal. Florida law is clear that the Petitioners cannot claim to have "raised" a "constitutional issue" by inserting such an "issue" in a defensive brief. *State v. Rogers*, 15 FLW D1426 (Fla. 4th DCA, June 1, 1990).

Here, the record is abundantly clear that the Petitioners never properly framed or raised a federal or constitutional question in the Florida courts and, as such, this Court should deny the Writ.

2. The Decision of the Florida Supreme Court is Grounded Upon Independent and Adequate State Grounds

The decision of the Florida Supreme Court herein is based upon state grounds that are independent and free of any federal question or constitutional issue and adequate to support the decision.

(Continued from previous page)

for the first time at the *appellate* level. D'Oleo-Valdez raised his due process argument at the district court of appeal level, not for the first time at the Supreme Court level. *D'Oleo-Valdez v. State*, 516 So.2d 1125 (Fla. 3rd DCA 1987). This distinction is crucial because, in Florida, the district courts of appeal constitute the courts of last resort except in limited circumstances. Rule 9.030, Florida Rules of Appellate Procedure, Committee Note, 1980 Amendment.

The decision of the Florida Supreme Court was that a judge who functions under color of authority is a de facto judge whose judicial acts are valid irrespective of whether his actual authority suffers from some procedural defect. No federal or constitutional issue or question was involved in this decision.[8] As such, this Court should not grant certiorari herein. *See, e.g., Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931).

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[8] Proof of the fact that the Florida Supreme Court decided this case solely under Florida law and that the Petitioners failed to present or preserve a federal or constitutional question, is the Florida court's statement, in its opinion, "the *only* argument presented at the trial court level was the defect in the assignment of [the Acting Circuit Judge]. We therefore choose to limit this opinion to the *de facto* judge issue . . . " (Emphasis supplied).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: July 31, 1990

Respectfully submitted,

CYNTHIA L. GREENE
LAW OFFICES OF
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Suite 1100
Miami, Florida 33132
(305) 372-3737

MELVYN B. FRUMKES
LAW OFFICES OF
MELVYN B. FRUMKES &
ASSOCIATES, P.A.
100 North Biscayne Boulevard
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(305) 371-5600

Counsel for Respondents

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

MICHAEL STEIN Petitioner and PATRICIA (CLARK) FOSTER and BRENT FOSTER her husband Respondents.	FAMILY DIVISION Case No. PETITION FOR DECLARATORY RELIEF RELEVANT TO ADOPTION AND FOR SUPPLEMENTAL RELIEF FLA. BAR # 151623

This is a Petition for Declaratory Relief pursuant to F.S. Chapter 86 et seq. and for Supplemental Relief, the petitioner, MICHAEL STEIN, through his undersigned attorney stating as follow:

1. Statutory authority for this petition is F.S. Chapter 86 et seq.

2. The right and legal status to be determined is whether MICHAEL STEIN is the natural and biological father of a child presently being carried by the respondent, PATRICIA (CLARK) FOSTER, the natural and biological mother of this unborn child.

3. Respondent, PATRICIA (CLARK) FOSTER, is and was at all times prior to conception of the subject child married to her husband, BRENT FOSTER.

4. MICHAEL STEIN alleges that he is the father of this unborn child conceived through artificial insemination with the sperm that he donated for this purpose.

5. The insemination was done without the prior written consent of BRENT FOSTER.

6. There is a justiciable controversy under the law, MICHAEL STEIN, claiming that he is the natural and biological father of the unborn child, even though this child was conceived during the marriage of PATRICIA (CLARK) FOSTER to BRENT FOSTER, her husband.

WHEREFORE, the petitioner prays for the following:

a) That he be found to be the natural and biological father of the subject child presently being carried by PATRICIA (CLARK) FOSTER.

b) That this Court retain jurisdiction of the parties and the subject matter, allowing in further proceedings amendment of this petition to include the request of HAYAT STEIN, the wife of MICHAEL STEIN, for adoption of the subject infant as the supplemental relief as permitted by F.S. Chapter 63 et seq.

c) For each other relief as this Court deems just.

LAW OFFICES OF ALLAN S. KESSLER
Attorney for Petitioner
The Roney Plaza
2301 Collins Avenue
Miami Beach, Florida 33139
Telephone: (305) 538-4421

/s/ Alan S. Kessler
Alan S. Kessler

BEFORE ME, the undersigned authority, personally appeared MICHAEL STEIN, who, after being duly sworn, deposes and says that all of the foregoing information is true and correct to the best of his information and belief.

/s/ Michael Stein
MICHAEL STEIN

SWORN TO AND SUBSCRIBED before me this 4th day of Aug 1986.

/s/ Suzan Shell Onnill
NOTARY PUBLIC

My Commission Expires: 1/21/87

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

MICHAEL STEIN	:	FAMILY DIVISION
Petitioner	:	
and	:	Case No.
PATRICIA (CLARK) FOSTER and BRENT FOSTER her husband	:	VERIFIED ANSWER
	:	FLA. BAR # 151623
Respondents.	:	

Respondents, PATRICIA (CLARK) FOSTER and BRENT FOSTER, her husband, make this their Verified Answer to the Petition for Declaratory Relief filed by the petitioner, MICHAEL STEIN in this matter and state:

1. We have read the petition and admit all of its allegations as being true and correct.

2. PATRICIA (CLARK) FOSTER stating affirmatively:

a) I am carrying a child conceived through artificial insemination with the sperm of MICHAEL STEIN; I refrained from having sexual intercourse with my husband during the period before the insemination as instructed by my physician.

b) MICHAEL STEIN is the natural and biological father of the unborn child I am carrying.

c) My husband, BRENT FOSTER, is not the father of this child.

FURTHER AFFIANT SAYETH NAUGHT. PATRICIA (CLARK) FOSTER.

1. BRENT FOSTER stating affirmatively:

a) I am not the biological father or the unborn child presently being carried by my wife PATRICIA (CLARK) FOSTER, the biological mother of this child.

b) I did not consent in writing to the artificial insemination of my wife with the sperm of MICHAEL STEIN.

c) MICHAEL STEIN is the natural and biological father of the unborn child presently being carried by my wife, PATRICIA (CLARK) FOSTER.

FURTHER AFFIANT SAYETH NAUGHT. BRENT FOSTER.

/s/ Patricia (Clark) Foster
Patricia (Clark) Foster

/s/ Brent D. Foster
Brent Foster

SWORN TO AND SUBSCRIBED before me this 11 day of August, 1986.

/s/ Kathleen A. Butler
NOTARY PUBLIC

My Commission Expires: March 5 1990

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

MICHAEL STEIN Petitioner and PATRICIA (CLARK) FOSTER and BRENT FOSTER her husband Respondents.	:	FAMILY DIVISION Case No. 86-42848 FC (16) AGREED ORDER REGARDING PATERNITY

THIS CAUSE having come before me upon the Petition of the petitioner, MICHAEL STEIN, for Declaratory Relief (Paternity) and for Supplemental Relief, and the Court having examined the verified petition and the verified answer filed by the respondents, and there being no dispute as shown by the petition and the verified answer as to who is the father of the unborn child presently being carried by PATRICIA (CLARK) FOSTER, to wit, MICHAEL STEIN, it is hereby

FOUND AND ORDERED:

1. That MICHAEL STEIN is found to be the natural and biological father of the unborn child presently being carried by PATRICIA (CLARK) FOSTER.

2. That BRENT FOSTER is found not to be the natural and biological father of the unborn child presently being carried by PATRICIA (CLARK) FOSTER.

3. That BRENT FOSTER did not consent in writing to the artificial insemination of his wife, PATRICIA

(CLARK) FOSTER, with the sperm donated by MICHAEL STEIN.

4. That upon the birth of the unborn child presently being carried by PATRICIA (CLARK) FOSTER all birth records shall reflect that the father of this child is MICHAEL STEIN and all hospitals and Bureaus of Vital Statistics are ordered to comply with the findings of the Court.

5. That the motion to amend the petition is granted adding HAYAT STEIN, the wife of MICHAEL STEIN, as co-petitioner, and is further amended to allow the filing of a Petition for Adoption on her behalf as the supplemental relief prayed for in the Petition for Declaratory Relief.

6. This Court retains jurisdiction over the subject matter and the parties.

DONE AND ORDERED in Chambers at Cutler Ridge, Dade County, Florida, this 19 day of December, 1986.

/s/ Edward Swanko
ACTING CIRCUIT
COURT JUDGE

Copies furnished to the parties

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

PATRICIA FOSTER,

Plaintiff,

-vs-

C.A. NO. 87
324862 DP

MICHAEL L. STEIN,

Defendant.

_____/

Herbert A. Brail (P 33722)
Attorney for Plaintiff
930 Mason
Dearborn, MI 48124
(313) 278-8775

_____/

CONSENT ORDER DETERMINING PATERNITY

At a session of said Court held in the Courthouse in OAKLAND COUNTY and STATE OF MICHIGAN on JAN 14 1987

PRESENT: HONORABLE JESSICA R. COOPER
CIRCUIT COURT
JUDGE

This matter having come before the court on the Complaint of PATRICIA FOSTER, Plaintiff, and the Court having examined said Complaint and the Answer of Defendant, MICHAEL L. STEIN, and there being no dispute shown by the Complaint and Answer as to the paternity of the unborn child or children presently being carried by PATRICIA FOSTER;

IT IS HEREBY ORDERED AND ADJUDGED, that MICHAEL L. STEIN, is found to be the natural and

biological father of the unborn child presently being carried by PATRICIA FOSTER;

IT IS FURTHER ORDERED AND ADJUDGED that BRENT FOSTER, husband of PATRICIA FOSTER, Plaintiff herein, is found not to be the natural and biological father of the unborn child or children presently being carried by PATRICIA FOSTER;

IT IS FURTHER ORDERED AND ADJUDGED that upon birth of the unborn child or children presently being carried by PATRICIA FOSTER, that all birth records shall reflect that the father of the child is MICHAEL L. STEIN and that all hospital and Michigan Department of Health, Bureau of Vital Statistics or records are hereby ordered to comply with the findings of this Court.

/s/ Illegible
CIRCUIT COURT
JUDGE

APPROVED AS TO FORM AND CONTENT:

/s/ Patricia Foster
PATRICIA FOSTER
Plaintiff

/s/ Herbert A. Brail
Herbert A. Brail
Attorney for Plaintiff

/s/ Michael L. Stein
MICHAEL L. STEIN
Defendant
In Pro Per

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

IN RE: The Adoption of ANDREW HYDE STEIN	FAMILY DIVISION
By: HAYAT STEIN Step-parent.	Case No. 86-42848 FC (16)
	CONSENT FOR ADOPTION
	FLA. BAR # 156481

KNOWN ALL MEN BY THESE PRESENTS:

That I, PATRICIA (CLARK) FOSTER, the undersigned mother of the infant known as ANDREW HYDE STEIN, born on the 25th day of March, 1987, in the City of Detroit, County of Wayne, State of Michigan, do hereby agree to relinquish all rights to and custody of said child to HAYAT STEIN, to be adopted by her as her legal heir at law and I waive all notice of and further consent to the adoption.

/s/ Patricia Clark Foster
PATRICIA (CLARK) FOSTER

Signed, sealed and delivered in the presence of:

/s/ Miriam Fein

/s/ Susan F. Morrison

STATE OF Michigan
COUNTY OF Oakland

SWORN TO AND SUBSCRIBED before me this 14th day of April, 1987.

/s/ Suzan Shell Onnill
NOTARY PUBLIC

My Commission Expires: 12/22/90

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

IN RE: The Adoption of ANDREW HYDE STEIN	FAMILY DIVISION
By: HAYAT STEIN Step-parent.	Case No. 86-42848 FC (16)
	CONSENT FOR ADOPTION
	FLA. BAR # 156481

KNOWN ALL MEN BY THESE PRESENTS:

That I, MICHAEL STEIN, the undersigned father of a male child known as ANDREW HYDE STEIN, born on the 25th day of March, 1987, in the City of Detroit, County of Wayne, State of Michigan, do hereby agree to allow my wife, HAYAT STEIN, to adopt ANDREW HYDE STEIN, not relinquishing any of my parental rights, duties and responsibilities toward this child, but so that together we can exercise permanent care, custody and control over ANDREW HYDE STEIN.

/s/ Michael Stein
MICHAEL STEIN

Signed, sealed and delivered
in the presence of:

/s/ Miriam Fein

/s/ Susan F. Morrison

STATE OF Michigan
COUNTY OF Oakland

SWORN TO AND SUBSCRIBED before me this 14th day of April, 1987.

/s/ Suzan Shell Onnill
NOTARY PUBLIC

My Commission Expires: 12/22/90

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

IN RE: The Adoption of ANDREW HYDE STEIN	FAMILY DIVISION
By: HAYAT STEIN Step-parent.	Case No. 86-42848 FC (16)
	PETITION FOR ADOPTION (Filed by mail 4/20/87)
	FLA. BAR # 156481

This is a Petition for Adoption in accordance with Florida Statute 63. The petition of HAYAT STEIN respectfully shows:

1. The minor sought to be adopted is a male infant of the Caucasian race who was born in Sinai Hospital, City of Detroit, County of Wayne, State of Michigan, on the 25th day of March, 1987.

2. The child's name is ANDREW HYDE STEIN.

3. The petitioner is named HAYAT STEIN, age 43. She resides with her husband, MICHAEL STEIN, the natural and biological father of said child.

4. The petitioner and her husband, MICHAEL STEIN, were married to each other on MAY 15, 1979 in DETROIT, MICHIGAN.

5. The petitioner has the facilities and the resources to provide for the health, care and welfare of said minor to be adopted.

6. The said minor to be adopted has no property of value at the time of the placement for adoption.

7. The petitioner desires to adopt the minor child. because she wishes to establish legally the parent-child relationship already existing between the parties and the minor child, and the petitioner has provided for the material wants of the minor child and is able to continue to do so in the future.

8. The written consents of the natural mother and natural father for the adoption of said minor child are attached hereto and made a part hereof. An Agreed Order Regarding Paternity, dated December 19, 1986, is also attached hereto and made a part hereof.

9. The subject infant has not been permanently committed to any child-placing agency.

10. This is a step-parent adoption.

WHEREFORE, the petitioner requests that a judgment of adoption of the subject infant be granted to her and that the child be known as ANDREW HYDE STEIN.

ROBERT M. JASINSKI
Attorney for Petitioner
The Roney Plaza
Mezz. Ste M-8
2301 Collins Avenue
Miami Beach, Florida 33139
Telephone (305) 538-4421

By Robert M. Jasinski
ROBERT M. JASINSKI

/s/ Hayat Stein
HAYAT STEIN

/s/ Michael Stein
MICHAEL STEIN

SWORN TO AND SUBSCRIBED before me this 14th day of April, 1987.

/s/ Suzan Shell Onnill
NOTARY PUBLIC

My Commission Expires: 12/22/90

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

IN RE: The Adoption of	:	FAMILY DIVISION
ANDREW HYDE STEIN	:	
By HAYAT STEIN, 364-50-6758, Step-parent.	:	CASE NO. 86-42848 FC (16)

FINAL JUDGMENT OF ADOPTION

THIS CAUSE having come before me on Final of Adoption, and the Court having heard testimony, and after reviewing the file, it is

ORDERED:

1. That the adoption of ANDREW HYDE STEIN by HAYAT STEIN, his step-parent, is hereby granted.

2. From the date of this order, ANDREW HYDE STEIN shall be the lawful son of HAYAT STEIN as if this child were the biological son of the petitioner.

3. HAYAT STEIN shall exercise with her husband and natural father of the child, MICHAEL STEIN, permanent care, custody and control of ANDREW HYDE STEIN.

4. All rights and obligations of the biological mother of ANDREW HYDE STEIN are hereby terminated by this order.

5. The Court finds that the consents of both natural parents are in proper form for purposes of this order.

DONE AND ORDERED in Chambers at Cutler Ridge, Dade County, Florida, this ___ day of May, 1987.

ACTING CIRCUIT
COURT JUDGE

Copies furnished to the parties.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

MICHAEL STEIN,	:	FAMILY DIVISION
Petitioner,	:	CASE NO. 86-42848 FC (16)
and	:	
PATRICIA (CLARK) FOSTER and BRENT FOSTER, her husband,	:	VERIFIED RESPONDENTS' MOTION FOR RELIEF FROM JUDGMENT AND MEMORANDUM OF LAW (FLA. BAR. NO. 279285)
Respondents.	:	

Respondents, PATRICIA (CLARK) FOSTER and BRENT FOSTER, file this Motion for Relief from "Agreed Order Regarding Paternity" and from "Final Judgment of Adoption", pursuant to Rule 1.540(b)(3) and (4), Florida Rules of Civil Procedure, and, as grounds therefor, state as follows:

1. On May 29, 1987, this Court entered a "Final Judgment of Adoption" permitting HAYAT STEIN to adopt a minor child, the natural son of Respondent, PATRICIA (CLARK) FOSTER. A true and correct copy of said Judgment is attached hereto as Exhibit 'A'.

2. This Court had previously entered on "Agreed Order Regarding Paternity", on December 19, 1986, upon the "Petition for Declaratory Relief Relevant to Adoption and for Supplemental Relief", filed by Petitioner, MICHAEL STEIN, through his attorney, Alan S. Kessler, Esq. Copies of the Order and Petition are attached hereto as Exhibit 'B' and 'C', respectively.

3. Subsequent to the entry of "Agreed Order Regarding Paternity", HAYAT STEIN, through her attorney, Robert M. Jasinski, Esq., filed a "Petition for Adoption" of the infant. A true and correct copy of said Petition is attached hereto as Exhibit 'D'.

4. Attached to said Petition was a "Consent for Adoption", alleged to be signed by PATRICIA (CLARK) FOSTER, the natural mother. Although it appears that PATRICIA (CLARK) FOSTER's signature was affixed to the "Consent", the acknowledgment is false as PATRICIA (CLARK) FOSTER never signed any document in the presence of the notary or the two (2) witnesses.

5. At the time this action was filed, the Petitioner was a Michigan resident and the Respondents were Michigan residents who were never served with process in connection with this proceeding. Moreover, at the time the proceeding was commenced, the child, who is the subject of this paternity and adoption action, was not born.

6. The subject child was born on March 25, 1987, in the State of Michigan. At no time during the pendency of these proceedings was the infant within the territorial jurisdiction of this Court. Moreover, at no time did this Court appoint a Guardian Ad Litem to act for said child.

7. Attached hereto as Composite Exhibit 'E' are true and correct copies of Administrative Orders numbers 86-149; 86-150; 86-151; 86-152; and 86-153. 86-149 deals with cases emanating from the Family Civil Department; 86-150 deals with General Jurisdiction Division cases and the disposition of counterclaims filed in civil actions ending in Circuit Court, exceeding the jurisdiction of the

County Court; 86-151 deals with simplified dissolution of marriage cases emanating from the Family Civil Department; 86-152 deals with paternity cases *filed* by the State Attorney's Office; and 86-153 deals with cases emanating from the Criminal Division. None of these Administrative Orders authorize a County Court Judge, such as Edward Swanko, to hear and determine a declaratory action concerning paternity as in the instant case. In view of this, Respondents respectfully submit that Honorable Edward Swanko was without jurisdiction to enter the "Agreed Order Regarding Paternity" he did in the above proceeding as an "Acting Circuit Judge", since he was not authorized, under any administrative order, to hear and consider the instant action for declaratory relief. Sitting County Court Judges are not authorized to hear actions for declaratory relief, since those actions, pursuant to Chapter 86, Florida Statutes, are to be brought in Circuit Court. In view of the Administrative Orders in force during the period of December 1-31, 1986 (copies of which are attached), County Court Judges, and specifically the Honorable Edward Swanko, are not authorized in any fashion to consider the instant action absent an order appointing him. A review of the Court docket reveals that such an order is conspicuously absent. Therefore, the "Agreed Order Regarding Paternity" is void. Similarly, the "Final Judgment of Adoption" is void. Attached hereto as Exhibit 'F' are Administrative Orders numbers 87-59; 87-60; 87-61; 87-62; 87-63; and 87-64 which were in force during the period of May 1-31, 1987. 87-59, 87-60, 87-61, 87-63 and 87-64 deal with the same matters as 86-149, 86-150, 86-151, 86-152 and 86-153, respectively.

(87-62 deals with five (5) county court judges, not including Judge Edward Swanko, who were temporarily assigned as Acting Circuit Court Judges in the General Jurisdiction Division.) With the exception of Order No. 87-59, none of these Administrative Orders authorizes a County Court Judge to hear an "uncontested adoption", and enter a "Final Judgment of Adoption". 87-59 assigns several county court judges, including Judge Edward Swanko, to temporarily serve as:

> "Acting and Temporary Judges of the FAMILY CIVIL DEPARTMENT of the FAMILY DIVISION of the Circuit Court, to hear, try, conduct, determine and dispose of these cases assigned to them by the Associate Administrative Judge of the Family Division of the Circuit Court, effective May 1, 1987, through and inclusive of May 31, 1987, and thereafter dispose of all those matters considered by them during said period."

A review of the Court docket fails to show an Order from the Associate Administrative Judge of the Family Division appointing Judge Edward Swanko to hear this matter.

8. Notwithstanding the above, the "Final Judgment of Adoption" is also void.

9. Respondent, PATRICIA (CLARK) FOSTER, had an initial contact with Noel P. Keane, Esq., an attorney in Michigan, prior to signing the Surrogate Parenting Agreement ('Agreement'), a copy of which is attached hereto as Exhibit 'G'.

10. On page 6 of the Agreement, Noel P. Keane, signed the document as "Attorney for Natural Father". On Page 7 of the Agreement, Herbert A. Brail signed as

"Attorney for Surrogate and her Husband". In addition, page 21 of the Agreement, titled "Acknowledgment of Independent Counsel", was signed by Herbert A. Brail, as the Respondents' "independent" counsel. Respondents at all times believed that they were being represented by independent counsel, when, in fact, as indicated in a letter dated August 29, 1986, from the law offices of Noel P. Keane, P.C., to PATRICIA (CLARK) FOSTER, Herbert A. Brail was an attorney in Mr. Keane's law firm. A copy of said letter is attached hereto as Exhibit 'H'.

11. In that same letter, it stated in part that "Mr. Kessler represents the couple in the Paternity Hearing and Mr. Jasinski will be representing your interests". Robert M. Jasinski, Esq., did in fact file a Notice of Appearance on behalf of the Respondents. Although Robert M. Jasinski was supposed to represent PATRICIA (CLARK) FOSTER's interests, at some time subsequent thereto he became counsel for the Petitioner, MICHAEL STEIN, in this action.

12. Based upon the fraud perpetrated by the Petitioner herein and through counsel and/or the Petitioner as well, and the collusion of counsel, the "Final Judgment of Adoption" and "Agreed Order Regarding Paternity" should be summarily vacated and set aside.

13. Respondents have retained the undersigned counsel and have agreed to pay them a reasonable fee for their services.

WHEREFORE, Respondents respectfully request this Court to enter an Order vacating the setting aside this Court's "Agreed Order Regarding Paternity" and "Final

Judgment of Adoption", and award Respondents a reasonable attorney's fee.

MEMORANDUM OF LAW

Respondents are clearly entitled to relief from the "Agreed Order Regarding Paternity" and "Final Judgment of Adoption" entered herein because the Court lacked the jurisdiction to enter same and because of the fraud and collusion which permeate said Orders.

Rule 1.540(b) Fla.R.Civ.P. provides in pertinent part:

> On motion and upon such terms as are just; the Court may relieve a party or his legal representative from a final judgment, decree, order or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment or decree is void; . . .

In the instant action, Judge Edward Swanko was without jurisdiction to enter the "Agreed Order Regarding Paternity", from which the "Final Judgment of Adoption" followed. In *Stern v. Whitehead*, Case No. 86-12060 (FC-24), Eleventh Judicial Circuit, a case factually identical to the instant case, Judge Philip Cook entered an "Order Granting Respondents' Motion for Relief from Judgment and Respondents' Supplemental Motion for Relief from Judgment" (Exhibit 'I'), dated September 4, 1986, vacating and setting aside the Court's "Agreed Order Regarding Paternity" procured by Alan S. Kessler, Esq., attorney for Petitioner, in concert with Robert M. Jasinski, Esq., as "Attorney for Respondents". Respondents are entitled to relief pursuant to Rule 1.540(b)(4).

Additionally, The Petitioner's fraud is clearly the type of intrinsic fraud which may be addressed by the Court by granting relief from the judgment if the motion for relief from the judgment is made within one (1) year of the judgment. *DeClaire v. Yohanan*, 453 So.2d 375 (Fla. 1984):

> Under Rule 1.540(b) as it is presently written, a party may, by motion, seek to set aside a final judgment, decree, order or proceeding on numerous grounds not previously available, including instrinsic fraud. Where the basis of the motion is mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, intrinsic or extrinsic fraud, misrepresentation, or misconduct of an adverse party, such motion must be made within a reasonable time and in no event more than one (1) year from the entry of the final judgment. Id. at 378. (Emphasis added).

In *DeClaire*, supra, the Supreme Court of Florida explained that intrinsic fraud is fraudulent conduct which arises within a proceeding, relating to the issues tried and includes false testimony given in a proceeding. The Court there denied the Wife's Motion for Relief from the Judgment based on fraud on the Court filed three (3) years after the judgment because the Wife complained of intrinsic fraud and, therefore, the motion had to be filed within one (1) year of the Judgment.

Where within one (1) year from the judgment a former partner filed a motion for relief from a consent judgment procured by fraudulent representations, the Court held that the trial court's denial of the motion without holding an evidentiary hearing was error and remanded for hearings to determine whether or not there

was fraud or misrepresentation which would justify vacating the final judgment. *Rosenthal v. Ford,* 443 So.2d 1077 (Fla. 2d DCA 1984). The Court in *Streater v. Stamper,* 466 So.2d 397 (Fla. 1st DCA 1985), reversed the trial court's granting of an untimely 1.540(b) motion noting that allegations that the judgment had been procured by fraud, misrepresentation and perjury were "an assertion of intrinsic fraud and it is thus subject to the one year limitation period provided by Rule 1.540(b)".

In *Alexander v. First National Bank of Titusville,* 275 So.2d 272 (Fla. 4th DCA 1973), the trial court struck a counterclaim alleging that in a prior suit the plaintiff had misstated the amount of an indebtedness which resulted in fraud upon the Court. The appellate court affirmed upon a finding that it was inappropriate to bring an independent action to remedy this fraud:

> The 'fraud' to which the counterclaim speaks is in our view the type of fraud contemplated by subsection '(3)' of Rule 1.540(b), RCP, and should have been brought to the attention of the Court by a motion filed in the original action – not an independent action. Id at 274.

See also *Westcott v. Westcott,* 444 So.2d 495, 497 (Fla. 2d DCA 1984):

> In contrast, allegations of either intrinsic or extrinsic fraud may be sufficient grounds for a motion to set aside a judgment if the motion is made in the same lawsuit within one (1) year after entry of the judgment, pursuant to Rule 1.540(b).

In *Pelekis v. Florida Keys Boys Club,* 302 So.2d 447 (Fla. 3d DCA 1974), the defendant moved to vacate the judgment stating that it was procured by fraud and that

newly discovered evidence showed that a warranty deed to the plaintiff was actually two separate instruments which had been taped and one of the signatures forged. The Third District Court of Appeal on the interlocutory appeal reversed the trial court's denial of discovery in this matter and ordered the trial court to permit full discovery and to conduct an evidentiary hearing on the motion to vacate, noting that a motion to vacate based upon fraud is a serious charge which requires a full opportunity to present all available facts to the court.

In *Stella v. Stella,* 418 So.2d 1029 (Fla. 4th DCA 1982), the wife filed a motion for new trial which the court chose to treat as a 1.540(b) motion. She alleged that her husband misrepresented the value of his assets. The court, in reversing the court's denial of an evidentiary hearing, stated:

> "if proven this conduct would constitute the kind of fraud, misrepresentation, or other misconduct of an adverse party contemplated by the provisions of Rule 1.540(b)."

It is clear then that if a motion for relief of judgment is filed within a reasonable time and, at most, within a year from the final judgment, the Court may grant relief for intrinsic fraud such as perjury or other misrepresentation made during the proceedings.

Here, the Petitioner misrepresented to the Court that the Respondents have appeared voluntarily and that they have consented to the relief he has sought. By virtue of the fraud perpetrated on this Court and the misuse of this Court, the "Agreed Order Regarding Paternity" and the

"Final Judgment of Adoption" should be set aside. Petitioner and his counsel have wrongfully deceived and used this Court.

WHEREFORE, Respondents respectfully request the entry of an appropriate Order as set forth above, plus the award of reasonable attorney's fees and costs.

WE HEREBY CERTIFY that true and correct copies of the above and foregoing Verified Respondents' Motion for Relief from Judgment and Memorandum of Law were furnished by mail this 15th day of April, 1988, to: MELVIN B. FRUMKES, ESQ., Frumkes & Greene, P.A., 100 North Biscayne Boulevard, Suite 1607, Miami, Florida 33132; NOEL P. KEANE, ESQ., 930 Mason, Dearborn, Michigan 48124; ROBERT M. JASINSKI, ESQ., Roney Plaza, Suite M-8, 2301 Collins Avenue, Miami Beach, Florida 33139; DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES, Adoption Division, 1150 Southwest 1st Street, Miami, Florida 33130; and, MICHAEL STEIN, Petitioner, 1986 Meadow Court, Bloomfield Hills, Michigan 48033.

BUCHBINDER & ELEGANT, P.A.
Attorneys for Respondents
Commonwealth Bldg., 4th Flr.
46 Southwest First Street
Miami, Florida 33130
(305) 358-1515

By: /s/ Ira M. Elegant
IRA M. ELEGANT

By: /s/ Allan Jay Atlas
ALLAN JAY ATLAS

/s/ Patricia (Clark) Foster
PATRICIA (CLARK) FOSTER

/s/ Brent Foster
BRENT FOSTER

STATE OF MICHIGAN) ss.
:
COUNTY OF MONROE)

BEFORE ME, the undersigned authority, personally appeared PATRICIA (CLARK) FOSTER and BRENT FOSTER, her husband, the Respondents in the above action, each of whom, after being duly cautioned and sworn, acknowledged that she and he has read the foregoing "Verified Respondents' Motion for Relief from Judgment and Memorandum of Law" and that the same is true and correct.

WITNESS my hand and official seal in the County and State last aforesaid this 15th day of April, 1988.

Illegible
NOTARY PUBLIC,
State of Michigan

My Commission Expires: May 21, 1990

(NOTARY SEAL)

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

MICHAEL STEIN,

Petitioner,

and

PATRICIA (CLARK) FOSTER and BRENT FOSTER, her husband,

Respondents.

_____/

FAMILY DIVISION

CASE NO. 86-42848
FC (16)

RE-NOTICE OF HEARING
(Special Appointment)

FDI 096760

NOEL P. KEANE, ESQ.
930 Mason
Dearborn, MI 48124

DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES
Adoption Division
1150 S.W. 1st St.
Miami, FL 33130

TO:

MELVYN B. FRUMKES, ESQ.
Frumkes & Greene, P.A.
100 N. Biscayne Blvd., #1607
Miami, FL 33132

ROBERT M. JASINSKI, ESQ.
2301 Collins Avenue
Roney Plaza, Suite M-8
Miami Beach, FL 33139

YOU ARE HEREBY NOTIFIED that the undersigned has scheduled "Verified Respondents' Motion for Relief from Judgment" for hearing before the Honorable EDWARD SWANKO, Judge of the above-styled Court, in Chambers, at the Cutler Ridge Branch Courthouse located at 10710 S.W. 211 Street, Miami, Florida, on Wednesday, the 1st day of June, 1988, at 8:15 o'clock in the A.M.

PLEASE BE GOVERNED ACCORDINGLY.

IT IS HEREBY CERTIFIED that a copy of the foregoing has been furnished, by mail, to the above addresses, this 9th day of May 1988.

BUCHBINDER & ELEGANT, P.A.
Attorneys for Respondents
46 S.W. First St., 4th Fl.
Miami, Florida 33130
(305) 358-1515

By:/s/ Ira M. Elegant
Ira M. Elegant

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

FAMILY DIVISION

CASE NO. 86-42848 FC (16)

MICHAEL STEIN, Petitioner, and PATRICIA (CLARK) FOSTER and BRENT FOSTER, her husband, Respondents.	NOTICE OF HEARING (Fla. Bar No. 279285)

TO:

MELVYN B. FRUMKES, ESQ.
Frumkes & Greene, P.A.
100 N. Biscayne Boulevard
Suite 1607
Miami, FL 33132

DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES
Adoption Division
1150 S.W. 1st Street
Miami, FL 33130

NOEL P. KEANE, ESQ.
930 Mason
Dearborn, MI 48124

ROBERT M. JASINSKI, ESQ.
2301 Collins Avenue
Roney Plaza,
Suite M-8
Miami Beach, FL 33139

MICHAEL STEIN
1986 Meadow Court
Bloomfield Hills,
MI 48033

YOU ARE HEREBY NOTIFIED that the undersigned has scheduled the **Verified Respondents' Motion for Relief from Judgment** for hearing before the Honorable EDWARD SWANKO, Judge of the above-styled Court, in Chambers, at the Cutler Ridge Branch Courthouse

located at 10710 S.W. 211 Street, Miami, Florida, on Friday, the 29th day of April, 1988, at 8:30 o'clock in the A.M.

PLEASE BE GOVERNED ACCORDINGLY.

WE HEREBY CERTIFY that true and correct copies of the above and foregoing Notice of Hearing were furnished by U.S. mail to the above addresses this 15th day of April, 1988.

BUCHBINDER & ELEGANT, P.A.
Attorneys for Respondents
Commonwealth Bldg., 4th Floor
46 Southwest First Street
Miami, Florida 33130
(305) 358-1515

By:/s/ Allan Jay Atlas
ALLAN JAY ATLAS

(3)

Case No. 90-40

Supreme Court, U.S.
FILED
AUG 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PATRICIA C. FOSTER, et vir,

Petitioners,

vs.

MICHAEL STEIN, et ux,

Respondents.

Petition for Writ of *Certiorari*
To the Supreme Court of the State of Florida

PETITIONERS' REPLY

SHARON HUDDLE DeANGELO*
8316 Canyon Oak Drive
Citrus Heights, CA 95610
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Case No. 90-40

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PATRICIA C. FOSTER, et vir,

Petitioners,

vs.

MICHAEL STEIN, et ux,

Respondents.

Petition for Writ of *Certiorari*
To the Supreme Court of the State of Florida

PETITIONERS' REPLY

SUMMARY OF REPLY

Respondents misstate the facts and the law to this court. The trial court petition was *verified*, which is tantamount to testimony.[1] OA, p. 28. It was respondent who presented no evidence, not even an unverified pleading. The facts of lack of personal and subject matter *jurisdiction* were open and notorious, and clearly stated in the petition for relief. Moreover, the leading cases cited by Petitioners in the trial court

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[1] A verified pleading may itself be treated as an affidavit. *E.g.*, *Gordon v. Watson*, 622 F.2d 120 (11th Cir., 1980)

petition for relief from the judgment relied primarily on federal standards raising federal constitutional issues. Finally, Respondents presentation of consent forms with putative neutral witnesses, OA, p. 10 and 12, is clearly an artifact presented to deceive this court. There is no witness named "Miriam Fein"; the signer was "Miriam Stein" respondent Michael Stein's own mother. Exhibit 1.[2] The other alleged witness is Michael Stein's own sister signing in her married name. Petitioners claim Patricia never signed any document in anyone's presence, the crux of this case. OA, p. 19, ¶ 4.

Respondents would have this court believe that the trial judge is ignorant of the law and did not understand the legal principles treated by the cited cases. The appendix herein sets forth the full oral argument and demonstrates that the judge cut off Petitioners' presentation of arguments below, indicating a detailed understanding of the law and facts of the motion.

Adequate state grounds is not stated where there has been the violation of clearly established federal rights.

ARGUMENTS

I

A FORMAL RAISING OF A FEDERAL QUESTION IS NOT REQUIRED; IT ONLY REQUIRES THE ISSUE MUST NECESSARILY HAVE BEEN INVOLVED IN THE CASE

Respondents by their Opposition claim that Petitioners failed to raise and preserve the alleged federal constitutional questions. Opp., p. 1, 5, 6.

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[2] Pursuant to USSC Rule 32, a copy of the putative consent signed by Petitioner Patricia Foster is being lodged with the Clerk of this court for the Court's review. The consent form signed by Michael Stein is not available.

The issue of whether a federal question was sufficiently and properly raised in the state court is itself ultimately a federal question, as to which this Court is not bound by the decisions of the state courts.[3] *Street v. New York*, 394 U.S. 576, 582 (1969). Though the formal raising of a federal question is not essential, it must necessarily have been involved in the cause. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 62 A.L.R. 785 (1928). A party is not barred by a failure to cite below the proper constitutional provisions when the lower court considered the relevant provisions. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 217 n.3 (1968); *Gibbs v. Burke*, 337 U.S. 773, 779 (1949).

The petition to the trial court *cited DeClaire v. Yohanon*, 453 So.2d 375 (Fla., 1984), OA, p. 24, *Alexander v. First National Bank of Titusville*, 275 So.2d 272 (Fla. 1st DCA, 1985) and *Westcott v. Westcott*, 444 So.2d 495, 497 (Fla., 2d DCA 1984). OA, p. 25.

DeClaire was based primarily on federal standards and federal constitutional issues relying primarily upon *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878). *DeClaire*, *supra*, 444 So.2d, at 377. *Alexander* rested in part on federal standards *citing Toscaro v. C.I.R.*, 441 F.2d 930, 933 (9th Cir., 1971) and 7 Moore's Federal Practice (1972) ¶¶ 60.33, 60.36, 60.37. *Alexander*, *supra*, 275 So.2d, at 274. *Westcott* also was based primarily on federal standards and federal constitutional issues *citing Hazel-Atlas Glass v. Hartford Empire*, 322 U.S. 238 (1943) and 7 Moore's Federal Practice ¶ 60.33 (2nd

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[3] "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate court." 28 U.S.C. § 1653. This section has been construed to permit amendment of technically defective allegations of a federal question. *Cf., Boelens v. Redman Homes, Inc.*, 759 F.2d 504 (5th Cir., 1985) (cannot use to substitute new cause of action) *with Brennan v. University of Kansas*, 451 F.2d 1287 (Kan., 1971) (amendment will be permitted only where it would avail plaintiff). This court can deem the trial court petition amended so far as technicalities are concerned, in view of the fact that cases in support of the federal questions were urged and the trial court therefore necessarily decided the issues.

ed., 1979). *Westcott, supra*, 444 So.2d, at 497.

Moreover, the Florida Appellate Court considered the issues and found them moot because it held that the judge was not qualified, *citing DeClaire, supra* in footnote 7. PA, p. 6.

The cases cited by Respondents in their Opposition at page 10 for the proposition that a "mere reference" is not sufficient, do not support Respondents' claim and conflict with this Court's opinions *cited ante* by Petitioners. *E.g., Dyke supra,* 391 U.S., at 217 n.3; *Gibbs, supra,* 337 U.S., at 779. Respondents' citations have been eroded by the passage of time and cases from this Court which have held that the Bill of Rights is now applicable to the states by virtue of the 14th Amendment. *Generally, Duncan v. Louisiana*, 391 U.S. 145 (1968).[4]

The issues were therefore necessarily decided by the trial judge in denying Petitioners' application for relief.

II

A JUDGE SHOULD NOT BE PRESUMED TO BE IGNORANT OF THE LAW

Ignorance of the law is no defense. *Eg., Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912); *United States v. Murdock*, 290 U.S. 389, 393-396 (1933). Judges are presumed to know the law. F.R.Civ.P., R. 44.1; F.R.Evid., Rule 201 and 302; *Downs v. United States*, 564 F.2d 48 (1977); *United States v. Houston*, 4 M.J. 729 (AFCMR, 1978).

Respondents, in the face of the trial court's comments that it had read, in *detail*, the pleading, RA, p. 3, 4, 9, would impute ignorance or stupidity on the part of the judge. Clearly, based on the cases cited by petitioners (RA, p. 4, last

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[4] See text associated with footnotes 4 to 12.

paragraph) and the trial court's remarks, the trial court understood that federal questions were involved, and necessarily decided the issues adversely to Petitioners.

III

ADEQUATE STATE GROUNDS IS NO DEFENSE WHERE A FEDERAL RIGHT HAS BEEN VIOLATED

This court in *Chapman v. California*, 386 U.S. 18 (1967) was faced with the contention that California had the right to provide greater protections for the People, and therefore the decision of the State Court had adequate state grounds, and had done so by a provision to allow comment on a defendant's right to remain silent. The court rejected the adequate state grounds argument in the face of a clear violation of federal standards.

In this case, the adequate state grounds argument is no answer if in fact there is a violation of a federal constitutional right, and the decision departs from standards announced by this court. The petition demonstrates that there was a clear departure from this Court's decisions, therefore there simply is no adequate state grounds.

CONCLUSION

WHEREFORE, Petitioners pray for all that relief requested by their petition.

Dated: August 7, 1990

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Counsels for Petitioners

*Counsel of Record

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA[1]

FAMILY DIVISION

CASE NO. 86-42848

MICHAEL STEIN, :

Petitioner, :

vs. :

PATRICIA (CLARK) FOSTER :
and BRENT FOSTER,
her husband, :

Respondents. :

Cutler Ridge Courthouse
10710 S.W. 211th Street
Miami, Florida
June 1, 1988
8:15 a.m.

The above-styled cause came on for hearing before the Honorable Edward H. Swanko, Circuit Court Judge Family Division, pursuant to Notice.

[1] The Appendix page numbers correspond to the original reporters transcript.

APPEARANCES:

FRUMKES & GREENE, P.A.
BY: MELVYN B. FRUMKES, ESQUIRE
on behalf of the Petitioner

BUCHBINDER & ELEGANT, P.A.
BY: IRA ELEGANT, ESQUIRE
on behalf of the Respondents

(Thereupon, the following proceedings were had:)

THE CLERK: Stein adoption. They didn't send the file down on this adoption.

MR. ELEGANT: Your Honor, Ira Elegant, Buchbinder and Elegant, representing the Respondents.

Your Honor, this an unusual case. There are a number of others like it and one precisely like this one. We have filed - -

THE COURT: I read your motion.

MR. ELEGANT: Your Honor, very simply, there is a basic point. Your Honor, as a County Court judge under administrative order, was appointed as an acting Circuit judge during these relevant time periods to handle and consider certain types of cases. The various administrative orders are attached as Exhibit E to our motion. The orders are described in Paragraph 7 of the motion and fall into a broad range of categories.

Your Honor entered an order determining paternity in December, 1986, and also entered a final judgment of adoption in May, 1987. Unfortunately, this was a prevalent practice where certain lawyers had walked orders like this through various --

MR. FRUMKES: I'm going to object to reference

to any other case but this one. It is inappropriate. It is not authority, and I must raise that objection.

MR. ELEGANT: It's argument.

As a matter of fact, a precise order which Judge Cook entered -- and I'm not telling you to abide by that one -- the same case as Exhibit I.

THE COURT: I read the whole pleading.

MR. ELEGANT: Essentially, what we are saying is that the orders which were entered by Your Honor -- and I'm sure it was just an innocent thing relying upon lawyers that appeared before you, who indicated that they had cases that were resolved, voided. Unfortunately, as an Acting Circuit Judge, your powers were set forth in the various administrative orders. Those administrative orders do not confer power to enter these types of orders upon Your Honor during the relevant time period. And certainly as a County Court Judge, your Honor would not have authority to enter an order determining paternity or enter an order of adoption.

We submit to you that the orders are void. The cases are clear that when you enter a void order it should be set aside upon motion or unilaterally, and we submit to you that these orders should be summarily set aside.

MR. FRUMKES: I notice counsel referred to an order that Judge Cook entered. He didn't mention who his opposing counsel was in that case, seeing that I'm in love with his opposing counsel because she's my wife.

I'm somewhat familiar with that case and I think my brother on the other side of the table, who I have a tremendous amount of respect for, would tell the Court that that order was entered by agreement. Just this morning at 6:00 when we both woke up, I learned that it was by agreement with counsel. So that order that Judge Cook entered is of no authority whatsoever. It's a different case, a different era. When I had dinner with Judge Harvey Sarkow last Thursday night, he had his own comments about that case.

First, let's talk about the order concerning paternity. The order, consent order determining paternity that was entered by the Michigan court after the child was born on January 14, 1987, which I give to the Court a certified copy --

MR. ELEGANT: Your Honor, I'm only dealing with the Florida orders.

MR. FRUMKES: That makes that argument moot, so that makes no difference whatsoever.

MR. ELEGANT: So then it should be vacated, if that's the case.

MR. FRUMKES: No, it shouldn't be vacated.

Ira, I only interrupted you for an objection. I apologize for speaking while you are interrupting.

MR. ELEGANT: Excuse me. You are right.

MR. FRUMKES: Counsel overlooked the fact that there's an administrative order 87-9 that did give Your Honor the authority to enter the adoption. I'm getting a sickness called deja vu. I think I have been here before. This is the third or fourth time I have been here on this case to uphold this adoption.

The challenge that I have heard so far in the oral argument, or the other arguments which were made before this Court, this Court has ruled on. The challenge is based upon the fact that this Court didn't have jurisdiction.

This 87-9 gave this Court jurisdiction. You properly entered the order for adoption. It cannot be challenged on that ground, nor, as a matter of fact, on any other ground, which I will be happy to argue when the time comes.

MR. ELEGANT: May I look at that, Your Honor?

Mr. Frumkes is mistaken. We have collected the

administrative orders which designate which judges are to hear which matters. The problem, what Mr. Frumkes has overlooked, the administrative order which is required under the administrative order 87-9. 87-9 says these matters will be heard by County Court judges acting as Circuit Court judges of the Eleventh Judicial Circuit under appropriate administrative order of the Chief Judge of this court.

There is no order which appoints Your Honor to implement this order. The administrative orders which we have attached to the motion, 87-59, assigns several County Court judges, including Your Honor, to temporarily serve as acting and temporary judges of the Family Division of the Circuit Court, to hear, try, conduct, determine and dispose of these cases assigned to them by the Associate Administrative Judge of the Family Division of the Circuit Court, effective May 1, 1987, through and inclusive of May 31, 1987, and thereafter dispose of all those matters considered by them during said period.

The problem is -- and here is a printout of the docket sheet in this case. There has been no separate administrative order implementing the order that Mr. Frumkes relies upon, under which Your Honor

was designated as an Acting Circuit Judge to hear adoption matters or paternity matters. The point of this is very simple. Mr. Frumkes is arguing that consent of any kind would override any of this. That is wrong. As a matter of law, parties cannot confer jurisdiction upon the Court, particularly subject matter jurisdiction. You can confer jurisdiction over the person by consent, but you can't confer subject matter jurisdiction. He would almost tell you that if somebody walked in here and said, "Your Honor, we have a patent infringement case and we are agreeing to have Your Honor hear this case," that confers subject matter jurisdiction, or a Securities Act violation under the Securities Act of 1934, where jurisdiction is vested solely in the federal district court.

You can't confer jurisdiction by consent. We submit, too, Your Honor, that the agreed order regarding paternity and the final judgment of adoption must be set aside. They are void. There's no order that implements this broad administrative order which Your Honor has the power to hear any of these.

MR. FRUMKES: Well, counsel, of course, is setting up a strawman, he says I said something that

I never argued and then he knocks it down. That's fine, but it doesn't get around the argument. We never talked about consent and conferring jurisdiction on the Court. 87-9 confers jurisdiction on this Judge under the appropriate administrative order which refers not to individual assignment of individual cases, but the appropriate administrative orders that give County judges authority to do this. I think you had authority under this order. You thought you had authority. Otherwise, you never would have entered it.

I think it's proper, and the appropriate administrative orders outline the duties of a County judge under such order. It's not a specific assignment.

Thank you, Your Honor.

MR. ELEGANT: We have laid them all out. It's a specific assignment.

THE COURT: Okay. Mr. Elegant, I went through your motion, detailed motion.

MR. ELEGANT: Yes, sir.

THE COURT: And I must comment and compliment you, that you did an excellent job in preparation. However, I'm going to deny your motion.

MR. ELEGANT: Okay.

MR. FRUMKES: Thank you, sir.

I don't mind if the Third District Court knows I'm in love with his opposing counsel in that other case.

MR. ELEGANT: Do you have a form order that you are going to use, Your Honor?

THE COURT: You can submit it.

MR. ELEGANT: Do you have one of them out here?

THE COURT: No, I don't.

(Thereupon, this hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)
: SS
COUNTY OF DADE)

I, ZULMA M. RUIZ, Registered Professional Reporter and Notary Public in and for the State of Florida at Large, hereby certify that the foregoing pages, numbered from 1 to 10, inclusive, are a true and correct transcription of my stenographic notes of the proceedings had and testimony taken before the Honorable Edward H. Swanko in the foregoing cause, at the time and place hereinabove set forth.

IN WITNESS WHEREOF, I hereunto set my hand and affix my official seal this 6th day of July, 1988.

/s/ Zulma M. Ruiz
ZULMA M. RUIZ, Notary Public
State of Florida at Large

My commission expires:

January 8, 1992